

# Legal News

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## A Day at the Prison Fun Park

*by Daniel Burton-Rose*

"Have you guys been here before?" a female high schooler asks two young guys in baseball caps and shorts. "We have," she goes on. "We liked it so much we came back a second time." I hear an older man saying to his family, with just a tinge of irony, "This place is just like Disneyland, except the lines are on the left side!" As in Disneyland, people are willing to wait an hour or more for a good ride.

A hundred or so folks, of different classes and races, are squished into a large concrete room ringed with American flags. We've just been informed that

this is the receiving room for the new Ohio State Penitentiary (OSP) administrative maximum security prison in Youngstown, and that the first shipment will be coming in any day now from the maximum-security Southern Ohio Correctional Facility in Lucasville. It's the last day of a four-day media blitz by OSP. A ribbon cutting ceremony on Thursday, April 9, 1999, was followed by a three day "Open House" - advertised in three states - in which the public was invited on guided tours of the prison.

The open house was a primo PR effort, rallying locals behind the newest and most extreme state penitentiary in Ohio. Dave Bobby, assistant to OSP warden David Johnson, estimated 13,000 people came through the prison during the open house. They were almost entirely from Youngstown and several surrounding towns, including some across the nearby Pennsylvania border. The Supermax is something new to be proud of in a town that's seen nearly half its population desert since the late '70s. Passing the sinking porches of homes and the crumbling abandoned businesses on the way to the prison, it's easy to understand why some people take pride in this state-of-the-art Bastille.

The only thing that marred the event for the state were 40 or so protesters from Oberlin College's radical student group Oberlin Action Against Prisons. They distributed 2,000 plus pamphlets voicing human rights and school vs. prison concerns, and spoke to the media and any passersby who wanted to feel them out.

A Supermax - as in "super-maximum security" - is typified by extreme isolation of 22-24 hours a day. Such isolation, bordering on absolute sensory deprivation, was originally used in the 1820s as a crude means of rehabilitating American prisoners. It was refined in the 1970s, when the German state used sensory deprivation against members of the communist guerilla group the Red Army Faction. At the same time, the United States employed extreme isolation (as well as forced administration of experimental drugs and the threat of lobotomization) against prisoner revolutionaries, most notoriously in the Behavior Modification Unit of the U.S. Penitentiary at Marion.

As used in the U.S. today - over 40 states and the District of Columbia have a unit of extended isolation cells or an entire prison of them - they teach prisoners "what we want to be like," as an OSP tour guide put it. People confined in such conditions report terrifying and violent fantasies. They also often self-mutilate in hideous ways, such as the men in Indiana's control unit at Wabash Valley Correctional Facility who chewed themselves and inserted pencils in their penises and straightened paper clips into their abdomens. Human rights groups such as Amnesty International and Human Rights Watch have condemned the extended isolation regimen as state-sponsored psychological torture equal to physical violence. Prisoners are sent to such units or prisons because they are deemed worthy candidates, not because of their original crime.

### Inside

From the Editor	3
IL Prison Industries Investigation	4
Valdes Murder Witness Exiled	5
Arizona Prison Cost Law Upheld	5
Call for Stun Belt Ban	6
Prosecutors Celebrate Death	7
California Media Access Bill Vetoed	7
News in Brief	8
Florida Limits Stun Belt Use	9
Subject Index	10
Life in Prison over Fine Refusal	27
Citation Index	28
Washington Cities Liable	30

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## Fun Park (Continued)

I was one of the protesters. We wanted to see the prison and hopefully deflate the propaganda tours by participating in them.

The tours, led by soon-to-be guards transferred in from other state prisons and low-level administrators, titillated the Midwesterners with visions of suffering Hannibal Lecters, "worst of the worst" cases who screwed up every chance they'd been given and were sent to OSP to get their due. The atmosphere of extra-tight control implied that anyone subjected to it deserved it.

Gay McCown, a guard trainer and my first tour guide, displayed OSP's high-security features with gusto and pride. Innovative toys now functional at OSP include towel hooks that retract under pressure, so prisoners can't hang themselves; toilets that can't clog, so prisoners can't flood their cells in protest or insanity; cell lights that are controlled by guards and are never completely turned off, so guards can always see what prisoners are doing; doors with no opening so prisoners can't throw their shit and piss ("Inmates like to do nasty things," McCown explained).

She also displayed two large glass tanks, like empty aquariums, in the sixteen-cell "pods" where the prisoners will live. The tanks are exercise cells. "Everyone loves this," McCown cooed, as she pointed out the difference between outside and indoor recreation: the outside has a small grate, a couple inches wide, allowing fresh air to blow in. This is so that the cell meets the basic state requirements (though not the international requirements, McCown fails to mention) for "outdoor" recreation.

McCown keeps up the act, mocking prisoners and their little grievances such as cold coffee and hamburgers. As the word was at the time that the most brutal guards from the nearby Trumbull Correctional Institution were undergoing training for OSP, this trivialization was essentially a lie.

I asked McCown about how OSP administrators could get away with running a prison that violates the U.N.'s Minimum Standards for the Treatment of Prisoners (answer: these people have demonstrated that they need this level of security. "They

chose to be here."), and how this place will make anyone less crazy and dangerous ("These people are beyond rehabilitation."). McCown then tried to shuffle me off to talk to someone who could spin me better than she could, but I stay on the tour. I keep trying to challenge her rah-rah shit, and when the other folks on the tour get annoyed that I'm spoiling the show I strike up conversation with them. There's a nervous-nellie father in the group, whose daughter wants to be a guard at OSP. He wants to make sure she'll be safe. McCown and I assure him this isn't the kind of place where guards have anything to fear (except their souls, I added in my mind).

When I did meet with the warden after the tour, Johnson, a former social worker, catered to my perceived liberalism. He talked about how the prisoners he would cage had reached rock bottom and he wanted to help them rise. He spoke of general societal anomie and the high rates of illiteracy and survival of sexual abuse among the prisoners. He told me, "These are the people the Marines used to take, but now we're the socializer of last resort."

The goals Johnson set for himself were that after incarceration in OSP - be it several months or several years, he wouldn't state his ideal time frame - prisoners will be able to fit in in the isolation wing at Lucasville, and, "If we do a good job we'll have a very low suicide rate: I'm hoping for zero." Since I'd already seen the high tech toys designed to make it so that prisoners don't even have enough control over their lives to end their lives - a situation meeting anyone's definition of hell - it doesn't seem he'll have much of a problem meeting his goals.

I was outside OSP protesting the next day so I went on the tour again. A guard recognized me and said flatly, "You again." The tour guide was quickly switched to a slicker, higher-ranking guard.

A lot of the comments I heard from the other folks on the tour were jokes to their kids, telling them to be good or this is where they'll end up. When, asking the guide a question, I let slip a naughty word in describing the "fucking" cells, a mother looked at the presiding guard with indignation, then pulled her child away from my menacing presence, stroked his hair to assure him she was protecting him, and said "You just abused the rights of my child."

At least some people seemed shaken by the Supermax. Those who entered the narrow concrete cells and truly asked themselves what it would feel like to be forced to live in one weren't as psyched about the institution. A friend from Oberlin was visibly shaken. She said to me outside OSP: "This whole thing reminds me of an amusement park. You get

the whole community to come to a prison! And they bring their kids! They may as well sell ice cream and snow cones ... What does this say about our society?" OSP actually was hocking t-shirts, caps, and other merchandise at both the entrance and the exit of the tour. By Monday afternoon, the last day of the spectacle, all the child-sized shirts were sold out. ■

## From the Editor

by Paul Wright

Welcome to another year of *PLN*. This issue contains our case and subject index for 1999. In 1995 we decided that indexing *PLN* would greatly enhance its value as a research tool. All of our back issues are indexed and each January we have published the index to the previous year's worth of *PLNs*.

This will probably be the last year we publish our annual index as part of *PLN*. As *PLN* has grown in size our coverage has expanded and so has the index. *PLN* is currently publishing 28 or 32 pages each month (compared to 10 when we first started.) If we had the funds we could easily publish 40 or 50 pages per issue. However, if we publish more than 32 pages our printer cannot fold the issue and mailing the magazine flat significantly raises our postage costs, to say nothing of our printing bill being 'higher the more pages we print.

With the index now taking up more than half of the January issue, we will probably either mail the index separately, send it on request or post it on our web site in future years.

As always, we welcome comments, suggestions and feedback on the index and *PLN* itself. We are in the process of finishing a cumulative *PLN* index that will list, by subject and case name, all articles *PLN* has published between 1990 and 1999, the first ten years of *PLN*. Once it is finished and ready for shipping we will announce it in *PLN*.

I would like to thank everyone who has responded to *PLN*'s fundraising letter. If you haven't sent in a donation yet, it is by no means too late to do so. Every little bit helps. *PLN* needs to raise an additional \$24,000 this year to hire and pay a second staff person. Your support is urgently required to make this happen.

We would like to thank A Territory Resource in Seattle for giving *PLN* a

\$5,000 grant in November, 1999, to assist us in meeting our \$24,000 goal so we can hire a second staff person. We are especially grateful to Shannon Hall who has generously volunteered her time to assist *PLN* in seeking additional funding by writing grants. Earlier in 1999, Resist in Massachusetts gave *PLN* a \$2,000 grant which is what allowed us to expand the selection of books we offer to our readers. We are grateful to Resist and A Territory Resource for their support of *PLN* and the work we do.

The latest in the unending censorship struggles is that the Nevada Department of Prisons has decided to censor all copies of *PLN* entering Nevada prisons. Nevada prison officials refuse to respond to *PLN*'s inquiries on the reasons for the censorship but their attorney seems to think that if they can prohibit prisoners from writing each other then they can censor magazines that have articles written by prisoners, such as *PLN*. It appears that Nevada prison officials do not know the difference between a magazine and personal correspondence.

Speaking of idiots, Jeffrey Sperry is the Kansas prisoner who sued *PLN* claiming he was unhappy with one of our advertisers products. In November, 1999, the trial court in Leavenworth county, Kansas, granted *PLN*'s motion for summary judgement and ruled that *PLN* had not engaged in any fraudulent or deceptive conduct as Sperry had claimed in his frivolous suit. *PLN* has been dismissed from the case.

If you are wondering what happened to *PLN*'s book ads in this issue, rest assured we are still selling books. To make room for the index we decided not to run the ads in this issue, but we are still selling all the previously listed books. We will run the usual ads in next months issue. ■

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## State Police Investigate Illinois Prison Industry

According to a highly critical report by the Illinois Auditor General's office released April 21, 1999, a tire recycling industry at the Downstate Lincoln Corr. Center provided up to \$325,000 in free recycling services to private businesses over a 2-year period. It is unclear who benefited from the deals because they were informal barter agreements.

Internal prison auditors discovered problems at the tire recycling industry last year and referred the matter to the state police, which began an investigation. Police and prison officials have declined to name the companies that received free services; they also refused to reveal what was bartered in exchange for the tire recycling.

"Correctional Industries has been a program that is not run very well," said Auditor General William Holland. "And it's not just a single item. It's across the board."

Illinois Correctional Industries (ICI) employs about 1,600 prisoners in a vari-

ety of programs that include farming, sewing clothes, baking bread, making furniture and recycling tires. The Dept. of Corrections sells the products to state agencies and private companies. In 1998 ICI made a \$3.8 million profit, though auditors have questioned why the agency did not collect \$280,000 in state sales tax.

The Auditor General's office reported other troublesome findings in reviews of 34 facilities and programs in the Illinois DOC. For example, prison officials reportedly gave \$22,000 worth of free merchandise such as T-shirts, baseball caps and cups to unidentified non-profit organizations, state employees and state agencies.

"It looks as if it was run like a private fiefdom," said state Rep. Tom Dart. "It looks as if, if you knew certain people, you'd get free services, and some of the stuff is in the hundreds of thousands of dollars." ■

Sources: *The Chicago Tribune*, *Corrections Digest*

## Paper Wings

## V-Technologies

## Valdes Murder Witness Exiled, Muzzled

On the cover of the October 1999 *PLN* was an article describing the July 9, 1999 beating death of "X-Wing" prisoner Frank Valdes at the hands of Florida State Prison (FSP) guards. The day of the killing Valdes' partner and fellow X-Wing prisoner William Van Poyck wrote a letter to a Florida judge describing the incident in graphic detail.

Van Poyck and several other X-Wing prisoners were transferred to Union Correctional Institution shortly after the killing. State investigators said they wanted to prevent any witness intimidation or retaliation by FSP guards.

About two weeks later, in early August, Florida state DOC head Michael Moore instituted a temporary ban on face-to-face media interviews at the state's two highest security prisons: FSP (where Valdes was killed) and Union Correctional (where Van Poyck and other witnesses were stashed). Moore claimed that the media ban was sparked by the governor's concern for crime victims who are traumatized by criminals gaining celebrity status through TV interviews.

"With criminals committing notorious crimes," Moore wrote in a memo posted on the DOC's web site, "with the media eager to publicize them, and with more attention being given to the plight and rights of victims, we are obliged to review our [media access] policies."

"It's patently obvious what's going on," Randall Berg, director of the Florida Justice Institute in Miami told the *Miami Sun-Sentinel*. "Regarding the Valdes murder, they don't want the media in there because the media is uncovering dirty linen. Clearly the department doesn't enjoy the scrutiny going on."

After this and much more criticism, especially from Florida media, Moore rescinded the ban in the first week of October. However, in another stunning coincidence, the outspoken Van Poyck was transferred to a "supermax" Virginia prison, DOC officials announced October 5, for his own protection. Van Poyck was sentenced to death along with Valdes for his part in the 1987 shooting

death of a Florida prison guard while the pair attempted to break another friend out of prison.

"We don't think it's a wise correction policy to incarcerate an inmate in our system who is involved in the death of one of our officers," Florida DOC spokesman C.J. Drake told the *Palm Beach Post*. "It's being done for his safety and our security. We just can't take any chances."

Virginia's DOC chief, Ron Angelone, banned media interviews statewide in 1997, but last year rescinded the ban in all except the state's four highest security prisons -- including the "supermax" prison to which Van Poyck was transferred.

In addition to being a witness in the Valdes case, Van Poyck is a long time prisoner rights activist, a brilliant and effective pro se litigator and an outspoken and articulate critic of the Florida prison system. He has also been a contributing *PLN* writer. ■

Sources: *Palm Beach Post*, *Miami Sun-Sentinel*, *Associated Press*

## Oregon Farms

## Arizona Incarceration Cost Setoff Law Upheld

The Arizona Court of Appeals held that, as applied, the state's incarceration cost setoff law does not violate the Equal Protection Clause of the Fourteenth Amendment or the anti-abrogation provisions of the Arizona Constitution.

A jury awarded \$15,000 to Felix Duarte and \$1,500 to Raymond Sidoma for injuries they sustained during a prison work detail. But the trial court entered a judgment reducing Duarte's award to \$3,000 and Sidoma's award to \$300 pursuant to ARS § 31-238, which authorizes the state to recoup incarceration costs by seizing up to eighty percent of any claim made by, or monetary obligation owed to, a prisoner.

The court of appeals rejected the prisoners' claim that the trial court's application of § 31-238 deprived them of equal protection of the law, noting that the court must presume that the law is rational and that the prisoners had the burden of presenting evidence to overcome that presumption but failed to do so. The court also rejected the argument that § 31-238 violates Arizona's anti-abrogation provisions, holding that "it preserves the reasonable probability of obtaining redress without eliminating the fundamental right of recovery." See: *Duarte v. State ex rel. Lewis*, 971 P.2d 214 (Ariz.App.Div.2 1998).

States are precluded, however, from seizing federal judgments under state incarceration cost recoupment laws such as ARS § 31-238, because doing so interferes with the goals of federal recovery statutes such as 42 U.S.C. § 1983. When such a conflict occurs, state law is preempted by federal law and invalidated under the Supremacy Clause. See, e.g., *Hankins v. Finnel*, 964 F.2d 853 (8th Cir. 1992). See also: *Ford v. State*, 979 P.2d 10 (Ariz.App.Div.1 1999) [*PLN*, Dec. 1999], where the Arizona Court of Appeals held that the State cannot take both an eighty percent "cost of incarceration" deduction pursuant to ARS § 31-238 and a thirty percent "room and board" deduction under ARS § 31-245. Rather, when a prisoner's claim is for back wages, § 31-254 controls and § 31-238 does not apply. ■

# Amnesty International Calls for Stun Belt Ban

by Julia Lutsky

In 1996 *Amnesty International* called on the United States to “establish a rigorous independent inquiry into the use of stun belts and all other types and variants of electro-shock weapons;” it now calls for the outright banning of stun belts. “The use of the stun belt — an inherently cruel and degrading device — when there are effective alternatives should be unacceptable in our society. The stun belt clearly violates international standards, including treaties to which the United States is a party,” says *AI* in its June 1999 report, *Cruelty in Control?* “The Stun Belt and other Electro-Shock equipment in Law Enforcement.”

“The stun belt should be immediately banned and the use of other electro-shock weapons such as stun guns, stun shields and tasers should be suspended pending the outcome of a rigorous, independent and impartial inquiry into the use and the effects of the equipment.”

Both the 1996 and the 1999 *AI* reports detail the use of the Remote Electronically Activated Control Technology (REACT) belt, made by *Stun Tech*, of Cleveland, Ohio, and the Remote Activated Custody Control (RACC) belt made by Nova Products of Cookeville, Tennessee. The belts have been in use at least since 1993 and are now part of the federal prison system and the U.S. Marshalls’ Service. *AI* lists 112 local jurisdictions in thirty states and the prison facilities of twenty states as users of the belt. In eight states where the stun belt is not allowed, stun guns, stun shields and taser dart guns are in use.

The idea of cutting costs by using a few \$800 belts to keep prisoners in check is appealing in an increasingly overcrowded and expensive prison system; the U.S. prison and jail population is nearing the two million mark and growing. For the present, prison authorities are limited to using the belts only during the transportation of prisoners, judicial hearings, and for chain gangs. All of these uses violate international law.

“[T]he belt inflicts a 50,000 volt shock [that] enters the prisoner’s left kidney region and [travels] along...nerve pathways. Each pulse...give[s] rise to a rapid shock ... caus[ing] severe pain...and

instant incapacitation.” It is designed “for [the] total psychological supremacy...of potentially troublesome prisoners.” After all, according to *Stun Tech*, “if you were wearing a contraption around your waist that, by the mere push of a button...could make you defecate or urinate,...what would you do?” *Stun Tech* warns the belt should not be used to “unlawfully threaten, coerce, harass, taunt, belittle or abuse any person,” but adds that “as long as it is not used for officer gratification or punishment, liability is non-existent.”

“Since [1973] ‘taser’ dart guns, as well as direct-touch stun guns, batons and shields have become...widely...used by law enforcement officers...” They are, according to a U.S. Consumer Protection Safety Commission report, “non-lethal to normal healthy adults.” Deaths have, however, been caused according to a forensic pathologist quoted by *AI*: “[N]ine individuals who were alive and active, collapsed on taser and did not survive. In my opinion, the taser contributed to...these nine deaths...It seems only logical that a device capable of depolarizing skeletal muscle can also depolarize heart muscle and cause fibrillation...” The U.S. Bureau of Prisons has found the belt “medically safe,” but warns that it “should not be used on pregnant women, persons with heart diseases, multiple sclerosis, muscular dystrophy or who are epileptic.” The Bureau examines a prisoner “only after [s/he] has become incapacitated.”

In April of 1998 Ronald Hawkins, 48, faced sentencing after having been convicted for second degree burglary. He had stolen only \$265 worth of goods, but it was his third felony offense and, given California’s “three strikes” policy, he faced a sentence of 25 years to life. Acting as his own lawyer he interrupted the judge what she considered to be once too often; she warned that his stun belt would be activated if he persisted. When he replied that such use would be unconstitutional she ordered the bailiff to activate the device. “It was like a stinging in my spine and then a lot of pain in my back. I was paralyzed for about four seconds.” Hawkins filed a federal lawsuit.

In January of this year a federal judge issued a preliminary injunction banning its use in Los Angeles courtrooms. “He noted that ‘the stun belt, even if not activated, has the potential of compromising the defense. It has a chilling effect ... An individual wearing a stun belt may not engage in permissible conduct because of the fear of being subjected to the pain of a 50,000 volt jolt of electricity. ... A pain infliction device that has the potential to compromise an individual’s ability does not belong in a court of law.’” [see: “Stun Belts in Court Unconstitutional,” *PLN*, September 1999] Los Angeles county has appealed the ruling and *AI* has stated it will support Hawkins with an *amicus* brief.

The use of stun technology is banned in some states and Western European countries. US-made electro-shock weapons are, however, sold overseas. Stun belts are now available to the electro-shock arsenals of countries where torture is routinely practiced. “U.S. companies have been marketing ... electro-shock weapons to such countries with the permission of the U.S. government.” *AI* calls on the federal and state governments to prohibit the manufacture and distribution of stun belts.

Given the prevailing attitude of inflicting ever harsher penalties, it is highly unlikely either that any official independent inquiry will be established or that the U.S. will act to curb the export of these items. More likely, their use will spread, as it has to Queen Anne’s County in Maryland. In April of 1997 the county authorities introduced “chainless” chain gangs. Stun belts replaced the chains. The theory behind their introduction was two-fold: Save the county money by reducing the number of officers needed to supervise work crews, and degrade and stigmatize their wearers. “‘Give them public humiliation,’ said ...[the] crew leader for a fast-food chain. ‘They never think twice about committing a crime.’” Of such attitudes *AI* remarks “Perhaps a society which believes certain of its members can by their actions forfeit their right to life and be executed by the state, more easily tolerates the use of a law enforcement device on prisoners which can cause them severe pain and humiliation at the touch of a button.”

The U.S. is party to the International Covenant on Civil and Political Rights, Article Seven of which states that "No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment." The Eighth Amendment to the U.S. Constitution specifies that "cruel and unusual punishments [shall not be] inflicted." According to the U.N.'s *Standard Minimum Rules for the Treatment of Prisoners*, "[i]nstruments of restraint, such as handcuffs, chains, irons and straight-jackets shall never be applied as punishment. [Restraints may] never be used in a manner ... [as to] cause humiliation or degradation." Just such restraints in the form of handcuffs, chains and now stun belts are widely used by prison authorities in this country. All of them constitute weapons available to the far right in its all out war on the burgeoning "third world" of the poor and people of color in the midst of this, the most affluent nation on earth.

The 1999 report, *Cruelty in control?* "The Stun Belt and other Electro-Shock equipment in Law Enforcement," is available at a cost of \$8.95 plus \$3.00 for shipping from *Amnesty International Publications*, 322 Eighth Avenue, New York, New York 10001. Payment may be made by check, money order or credit card. ■

## Drug Seizures Pay for Death Celebrations

In 1998 the East Baton Rouge District Attorney's Office shelled out \$1,291.27 for steak dinners to celebrate three death penalty verdicts. The DA's office used money and other assets seized in drug arrests to bankroll the celebratory dinners at a local steak house.

District Attorney Doug Moreau said the dinners were more recognition for hard work and long hours than reward for obtaining a death verdict.

"We know what it is," said attorney Benn Hamilton, who represented a client

who received the death penalty. "It is crude. It is morbid. It is an inappropriate use of public money."

Mike Mitchell, who directs a public defender's office said, "I don't think they go out to dinner on every case. If it's not to celebrate the death penalty, I don't know what it's for."

In fact, the DA's office did not spring for a steak dinner after the one capital case in 1998 in which the defendant escaped the death penalty by one vote. ■

Source: *Associated Press*

## California Governor Vetoes Media Access Bill

In September, 1999 California Governor Gray Davis vetoed legislation that would have rescinded his predecessor's policy of barring reporters from interviewing state prisoners.

The measure was supported by the California Correctional Peace Officers' Association (CCPOA) which said that barring reporters from prison makes their jobs harder, because it gives the public the perception that they [prison guards] have something to hide.

But victims' rights groups persuaded Gov. Davis that the bill would make media

darlings out of violent killers and thugs. In a message posted on his web site, Davis said he vetoed the bill because it was "inconsistent with the national trend to reduce, not expand, rights of prisoners (e.g., prohibiting them from profiting from their crimes by selling their 'stories' via book, television or movie rights)."

The bill would have restored past procedures governing media access to prisoners that worked well for 20 years before they were curtailed. ■

Source: *San Diego Union-Tribune*

### Spanish Law Dictionary Now Available

PLN is now offering for sale the best English Spanish, Spanish English law dictionary available on the market today. "Spanish Law Dictionary" by Peter Collin Publishing has over 90,000 entries. This includes accurate translations of the terms, example sentences and quotations from publications showing how the terms are used in real life. Spanish speakers in American prisons will find this book extremely useful. 650 Pages, hardcover. \$49.95. Order directly from: PLN, 2400 N.W. 80th St. PMB 148, Seattle, WA 98117 and include \$3.20 for postage. This is a special order item so wait an extra two or three weeks for delivery.

### Inmate Classified

### PLN On the Air

Every week PLN editor Paul Wright delivers prison news and commentary on radio station KPFA, 94.1 FM in San Francisco, CA. Titled *This Week Behind Bars* the show airs every Thursday or Friday between 5 and 6 PM as part of the *Flashpoints* program.

If your local radio stations aren't carrying any prison news or commentary ask them to carry *Flashpoints*. The show is available nation wide over a satellite feed. Straight out of the gulag. Radio stations interested in carrying the show should contact *Flashpoints* producer and host Dennis Bernstein at: (510) 848-6767.

## News in Brief

**CT:** In October, 1999, the state DOC announced it would send 900 prisoners to the Wallens Ridge State Prison in Virginia to relieve overcrowding. Wallens Ridge is a "super-max" prison that has been repeatedly cited for human and civil rights abuses by various human rights organizations.

**FL:** In October, 1999, Steven Manning, a guard at the Florida State Prison in Starke, was fired after being caught in a drug sting. An unidentified prisoner implicated Manning in an escape plot after prison officials discovered guard uniforms and weapons inside the prison. Cooperating with investigators, the prisoner gave Manning \$300 in marked bills to smuggle marijuana into the prison for him. Manning was arrested as he left the prison and charged with possession of contraband in a correctional facility after the marked bills were found in his possession.

**FL:** On October 13, 1999, Broward circuit judge James Cohn held assistant state attorney Alberto Milian in contempt of court and fined him \$500 and ordered him to pay \$2,600 in court costs. Judge Cohn found that in August, 1999, Milian had assaulted criminal defense attorney Ty Terrell in a hallway outside the courtroom where the two men were trying a robbery case.

Terrell suffered a black eye after Milian punched him in the face and threw him over a coffee table. Milian claimed Terrell had bumped him in an elevator and kicked him in the shin. Eyewitnesses disputed that claim and judge Cohn found Terrell not guilty of contempt. Milian is appealing the ruling. The defendant in the case was acquitted by the jury.

**GA:** On October 6, 1999, Lumpkin county jail prisoners Frank Mack and Thomas Limly escaped from custody while doing legal research at the public library in Dahlonaga. The jail lacks a law library. Prisoners representing themselves are taken to the public library to conduct legal research. Mack and Lumly, awaiting trial on drug and sex charges, respectively, asked to use

the bathroom. Once inside they removed their leg shackles and emerged from the bathroom running, one was wearing only boxer shorts. The escapees fled the library and jumped into a pickup truck apparently left for them to use.

**KY:** In September, 1999, Crittenden county jail guard Francisco Barela, 22, was charged with misconduct and endangerment. When police arrived at the jail to check on a suspect they found prisoners were roaming freely throughout the facility and had cold beer, loaded firearms and an 18 year old woman in their cells.

**MI:** On October 28, 1999, Wayne county assistant prosecutor Michael Gruskin was suspended from his job, with pay. While attending a domestic violence conference in Sparks, Nevada, on October 25, 1999, Gruskin reported to police that a prostitute he had hired had robbed him of \$500 and a watch.

**OH:** On August 12, 1999, Michael Fortner, a guard at the Ross Correctional Institution in Chillicothe, was arrested after being caught smuggling marijuana in his shoe and waistband of his pants while going to work at the prison. The drugs were discovered by state police using drug dogs to conduct random checks at Ohio prisons.

**TX:** El Paso county judge Sue Karita has raised ethical questions about the judicial system under which court appointed, lawyers are paid a \$50 bonus if they get their clients to plead guilty to misdemeanor offenses. Attorneys whose clients plead guilty are paid \$150 per case. Attorneys whose clients have charges dismissed after pleading not guilty or who enter informal pleas of guilty in exchange for probation, are paid only \$100 per case.

Judge Kurita has vowed to change the system by raising the fee paid to court appointed lawyers in misdemeanor cases to \$150, regardless of the outcome. "The lawyers in this court do not sell their clients out, but we don't want anyone thinking that could happen," she told reporters.

**WA:** On October 27, 1999, Bellingham police released the results of an investigation stating that Whatcom county jail guard Ryan Stollwerck had sexually harassed female coworkers at the jail. Stollwerck's conduct included making unwanted sexual comments, responding angrily when one of the women wouldn't return his phone calls, "improperly touching" one of the women and making mock kissing noises. This comes on top of prior discipline for similar sexual harassment of jail employees. Stollwerck denied the charges and said they were part of a smear campaign against him. The report was released a week before an election in which Stollwerck was running for Whatcom county sheriff. He lost the election. He also quit his job as a jail guard.

**WI:** On October 28, 1999, Douglas Blahnik escaped from the Marathon county jail in Wausau by crawling through a ceiling panel in a jail shower. Blahnik was being held on various charges and warrants.

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## Florida DOC Curtails Use of Stun Belts

Wilson Group

After several Florida circuit judges ordered the state prison system to stop using stun belts on prisoners, DOC Chief of Operations James Upchurch ordered the routine use of the of the belts temporarily discontinued, the *Palm Beach Post* reported in its 23 September, 1999, edition.

State officials say they are investigating why a stun belt malfunctioned June 9, 1999, repeatedly shocking a prisoner who was being transported to the state's sexual predator center (civil commitment detention facility) in Martin County.

Richard Hudson, 30, was being transported to the Martin Treatment Center in a state prison van when the remote-control stun belt discharged, delivering 50,000 volts into his body. The transport guards pulled off the road after they "heard Hudson yelling and kicking the security barrier in the van," prison records obtained by the *Post* state. The guards say they used a key to disable and remove the belt.

"[Hudson] described an intense pain," said Assistant Public Defender Nellie King of West Palm Beach, "and said he thought he blacked out when he was flopping around in the back of the van with 50,000 volts of electricity going through him -- and it went off twice. These things are torture devices."

Hudson had two burn marks where the belt's electrodes sent shocks into his back, said King, and he continued to have bladder and kidney problems nearly four months after the incident.

Florida DOC spokesperson Debbie Buchanan said that state officials suspect the belt may have been stored in a damp area, creating a short that caused it to discharge accidentally.

Dennis Kaufman, president of Ohio-based Stun Tech Inc., manufacturer of the device, would not comment. But previous reports have alleged that his company's stun belts have been "accidentally" discharged more times than they have been intentionally activated. ■

Source: *Palm Beach Post*

### Tele-Net

# 1999 Index

Every January starting with 1996 we publish a subject and case citation index of all articles that appeared in the previous year's issues. We welcome any comments, feedback or suggestions you may have on how we can improve the indexes. We have tried to make it as user friendly and helpful as possible. We are working on a 10 year cumulative index and expect to finish it soon.

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As a concluding note, the index confirms what *PLN* subscribers already know: We offer more prison news and legal reporting than any other publication for the cheapest price. So please encourage others to subscribe.

## Subject Index

**Note: "2:3"=Issue No.2, Page 3**

### Access to Media

California Parolee Gag Order Lifted; 1:3.  
*Jailhouse Journalism: The Fourth Estate Behind Bars* by James McGrath (Book Review); 4:6; Wright, Paul.  
Media Interview Protected Free Speech; 10:11; *Castle v. Clymer*, 15 F.Supp.2d 640 (ED PA 1998).  
Pennsylvania Ban on Writing by Mumia Abu-Jamal Enjoined; 5:5; *Abu-Jamal v. Price*, 154 F.3d 128 (3rd Cir. 1998).  
Perp Walks Unconstitutional According to New York Federal Court; 10:25; *Lauro v. City of New York*, 39 F.Supp.2d 351 (SD NY 1999).  
Public Access to Documents Resources; 5:9; Wright, Paul.  
US Supreme Court Holds Media Ride-Alongs Unconstitutional; 9:15; *Hanlon v. Berger*, 119 S.Ct. 1706 (1999); *Wilson v. Layne*, 119 S.Ct. 1692 (1999).

### Ad-Seg/Control Units

\$15,001 Excessive Force Verdict Affirmed; 1:12; *Williams v. Drake*, 146 F.3d 44 (1st Cir. 1998).  
\$660,000 Awarded in Post-Sandin Segregation Suit; 7:14.  
376 Days in New York Seg "Atypical and Significant" Hardship; 7:25; *Lee v. Coughlin*, 26 F.Supp.2d 615 (SD NY 1998).  
Arkansas Department of Corruption Revealed; 9:7; *Campbell v. Arkansas DOC*, 155 F.3d 950 (8th Cir. 1998).  
BOP Violates Due Process in Ad-Seg, Transfer and Mail Suit; 11:24; *Rizvi v. Crabtree*, 42 F.Supp.2d 1024 (D OR 1999).  
CDC Settles Corcoran Shooting Suit for \$2.2 Million; 12:9.  
Colorado Prisoner Beaten, Not Stabbed; 3:14.  
"Corcoran East" Opens in Virginia; 1:4.  
Court Screening Applied to Paid Suits Too; 6:13; *Martin v. Scott*, 156 F.3d 578 (5th Cir. 1998).  
Death Row Eulogy; 10:3; Van Poyck, William.  
Denial of Exercise Is "Atypical and Significant"; 9:28; *Bass v. Perrin*, 170 F.3d 1312 (11th Cir. 1999).  
*Edwards* No Bar to Seg Suit; 7:22; *Johnson v. Freeburn*, 29 F.Supp.2d 764 (ED MI 1998).  
Federal Judge Rules Texas Prisons Still Unconstitutional, PLRA Unconstitutional; 6:1; Clarke, Matthew T.; *Ruiz v. Johnson*, 37 F.Supp.2d 855 (SD TX 1999).  
*Heck* Not Applicable to Ad Seg; Only "Available" Exhaustion Required; 11:17; *York v. Huerta-Garcia*, 36 F.Supp.2d 1231 (SD CA 1999).

IDEA Confers Right to Education Even in SHU; 7:20; *State of NH v. Adams*, 159 F.3d 680 (1st Cir. 1998).  
Indiana May Not Deny Pay and Educational Programs to Protective Custody Prisoners; 4:20; *Faver v. Bayh*, 689 N.E.2d 727 (Ind.Ct.App. 1997).  
Insanity, Brutality and Fatality: Florida's X-Wing Marks the End of the Line; 10:1; Pens, Dan.  
Judicial Sentence of Life in Solitary Upheld; 3:21; *United States v. Felipe*, 148 F.3d 101 (2nd Cir. 1998).  
Lack of Standing Eviscerates Court Access Class Action; 9:25; *Walters v. Edgar*, 163 F.3d 430 (7th Cir. 1998).  
Lengthy Ad Seg Is Atypical and Significant Hardship; 3:18; *McClary v. Kelly*, 4 F.Supp. 2d 195 (WD NY 1998).  
*Maximum Security University*, edited by Tom Quinn (Book and Video Review); 12:8; Fischer, Bob; Stanton, Janet; Wright, Paul.  
Missouri Ends Ad Seg Ban on Publications; 7:8; *White-Bey v. Missouri DOC*, 24th Judicial Circuit, Wash. Co., CV-1098-435cc.  
No Liberty Interest in Ohio Ad-Seg Rules; 5:4; *Jones v. Baker*, 155 F.3d 810 (6th Cir. 1998).  
Retaliation Verdict Remanded for Damages; 12:26; *Trobaugh v. Hall*, 176 F.3d 1087 (8th Cir. 1999).  
Strip Mining Human Rights in Virginia's Supermax Dungeons; 7:1; Pens, Dan.  
The Mental Torture of American Prisoners: Cheaper Than Lab Rats, Part 2; 4:1; Sherrer, Hans.  
Trouble in Mind: ADX—The Fourth Year; 4:10; Levasseur, Ray Luc.  
Virginia Prison "Fire Trap" Finding Reversed; 2:9.  
Worst of the Worst?; 10:4.

### Administrative Procedures Act

Federal Parolee Has Right to Hearing Under 18 USC § 4211(a)(2); 9:25; *Valona v. US Parole Com'n*, 165 F.3d 508 (7th Cir. 1998).

### Americans with Disabilities Act

Individual Capacity Claims Not Applicable to RA and ADA; 8:16; *Montez v. Romer*, 32 F.Supp.2d 1235 (D Colo. 1999).  
Prisoners Entitled to Money Damages and Injunctive Relief under ADA and RA; 2:22; *Key v. Grayson*, 998 F.Supp. 793 (E.D. Mich. 1998).  
Settlement in Deaf Washington State Prisoners' Lawsuit; 2:12; Crollard, Jeff; *Duffy v. Riveland*, Case No.C92-1596R & C93-637R (W.D. Wash.).  
Trial Required in ADA Suit over HIV Medication; 12:19; *McNally*

*v. Prison Health Services*, 46 F.Supp.2d 49 (D ME 1999);  
*McNally v. Prison Health Services*, 52 F.Supp.2d 147 (D ME 1999).  
 Utah Jail Settles ADA Suit; 10:14; *Earls v. Salt Lake County*, USDC D UT, 2-98-CV-521J.

### Attorney Client

Adequate Opportunity for Discovery Required; 7:19; *Davis v. Kelly*, 160 F.3d 917 (2nd Cir. 1998).  
 Colorado Contraband Rule Requires Visitor Notice; 2:23; *People v. Holmes*, 959 P.2d 406 (Colo. 1998).  
 PLRA Attorney Fee Cap Not Retroactive in Attorney Client Case; 11:28; *Rodriguez v. Zavaras*, 22 F.Supp.2d 1196 (D.Colo. 1997).  
 Prisoners Have First Amendment Right to Private Conversations with Their Attorneys; 9:21; *Williams v. Price*, 25 F.Supp.2d 623 (WD PA 1998).  
 Pro Se Tips and Tactics (Appointment of Counsel); 3:10; Midgley, John.

### Attorney Fee Awards

\$130,000 in Damages and Fees Awarded in New York Retaliation Suit; 7:21; *Alnutt v. Cleary*, 27 F.Supp.2d 395 (WD NY 1998).  
 AHCC Bulk Mail Ban in *Miniken* Settled; 3:17; *Miniken v. Walter*, 9th Cir. Case No. 97-35913, 97-36072.  
 Attorney Fee Cap Inapplicable to Pre-PLRA Suits; PLRA Automatic Stay Provisions Constitutional; 2:6; *Hadix v. Johnson*, 143 F.3d 246 (6th Cir. 1998); *Hadix v. Johnson*, 144 F.3d 925 (6th Cir. 1998).  
 Attorney Fee Cap Inapplicable to Pre-PLRA Suits; PLRA Automatic Stay Provisions Constitutional; 2:6.  
 Attorney Fees Must Be Expressly Reserved; 8:14; *Wray v. Clarke*, 151 F.3d 808 (8th Cir. 1998).  
 Former Jail Prisoner Awarded \$8,000 for Abuse; PLRA Attorney Fee Limit Inapplicable to Juveniles; 4:5; *Doe by and through Doe v. Washington County*, 150 F.3d 920 (8th Cir. 1998).  
 PLRA Allows Fees on Fees in Failure to Protect Suit; 1:5; *Hernandez v. Kalinowski*, 146 F.3d 196 (3rd Cir. 1998).  
 PLRA Attorney Fee Cap Applies in \$65,000 Beating Case; 8:25; *Roberson v. Brassell*, 29 F.Supp.2d 346 (SD Tex. 1998).  
 PLRA Attorney Fee Cap Not Retroactive in Attorney Client Case; 11:28; *Rodriguez v. Zavaras*, 22 F.Supp.2d 1196 (D.Colo. 1997).  
 PLRA Attorney Fee Limits Not Retroactive in Second Circuit; 10:13; *Blissett v. Casey*, 147 F.3d 218 (2nd Cir. 1998).  
 PLRA Attorney Fee Provision Not Retroactive in Jail Conditions Suit; 11:28; *Inmates of DC Jail v. Johnson*, 158 F.3d 1357 (DC Cir. 1998).  
 Settlement in Deaf Washington State Prisoners' Lawsuit; 2:12; Crollard, Jeff; *Duffy v. Riveland*, Case No. C92-1596R & C93-637R (W.D. Wash.).  
 South Dakota Eliminates Law Libraries; 12:19.  
 Supreme Court Holds PLRA Attorney Fee Cap Inapplicable to Work Performed Before Enactment; 10:12; Clarke, Matthew T.; *Martin v. Hadix*, 119 S.Ct. 1998 (1999).

### Attorney Misconduct

Jail Brutality Verdict Reversed Due to Improper Argument and Jury Instruction; 3:23; *Spicer v. Rossetti*, 150 F.3d 642 (7th Cir. 1998).  
 Prison Officials Waive Untimely Asserted *Heck* Defense; 10:20; *Carr v. O'Leary*, 167 F.3d 1124 (7th Cir. 1999).  
 Washington EFV Cut-Off Date Questioned; 7:23; *Daniel v. Rolfs*, 29 F.Supp.2d 1184 (ED WA 1998).

### Civil Commitment

Kansas Good Time Rules Violate Ex Post Facto; 3:20; *Stansbury v.*

*Hannigan*, 960 P.2d 227 (Kansas 1998); *Bankes v. Simmons*, 963 P.2d 412 (Kansas 1998).

No Privacy Rights for Sex Offender Registrants; 11:9; *Paul P. v. Verniero*, 170 F.3d 396 (3rd Cir. 1999).  
 Oregon "Predatory Sex Offender" Label Requires Notice and Hearing; 4:14; *Noble v. Board of Parole*, 327 Or. 485, 964 P.2d 990 (1998).  
 Released Sex Offender Not "In Custody" for Habeas; 4:22; *Williamson v. Gregoire*, 151 F.3d 1180 (9th Cir. 1998).  
 Temporary Injunction Issued to Prevent Sex Offender Notification to Employer; 2:26; *Doe v. Fauver*, 3 F.Supp.2d 485 (D.N.J. 1997).

### Civil Procedure

Abuse of Discretion to Dismiss Medical Suit; 2:18; *Hudson v. McHugh*, 148 F.3d 859 (7th Cir. 1998).  
 Adequate Opportunity for Discovery Required; 7:19; *Davis v. Kelly*, 160 F.3d 917 (2nd Cir. 1998).  
 Administrative Remedies Exhausted When Response Time Elapses; 12:22; *Powe v. Ennis*, 177 F.3d 393 (5th Cir. 1999).  
 AEDPA Statute of Limitations Told; 1:12; *Miller v. New Jersey State DOC*, 145 F.3d 616 (3rd Cir. 1998).  
 Alabama Prison Officials Held in Contempt Again; 10:23; *Chairs v. Burgess*, 25 F.Supp.2d 1333 (ND Ala. 1998).  
 Amended Complaint Filed Outside Limitations Period Relates Back; 11:16; *Daily v. Monte*, 26 F.Supp.2d 984 (ED Mich. 1998).  
 Arizona Prisoners Can Pay Filing Fee in Installments; 7:18; *Inzunza-Ortega v. Superior Court*, 968 P.2d 631 (Ariz. App. Div. I 1998).  
 California Gas Chamber Ruling Vacated; 2:13; *Fierro v. Terhune*, 147 F.3d 1158 (9th Cir. 1998).  
 Concealment of Info Tolls Statute of Limitations; 10:19; *Blaskiewicz v. County of Suffolk*, 29 F.Supp.2d 134 (ED NY 1998).  
 Consenting to Have Magistrate Conduct Trial Not Waiver to Right to Jury Trial; 5:25; *Jennings v. McCormick*, 154 F.3d 542 (5th Cir. 1998).  
 Costs Imposed Regardless of Ability to Pay; 8:24; *Talley-Bey v. Knebl*, 168 F.3d 884 (6th Cir. 1999).  
 County Bankruptcy Tolls FRCP 4(m); 5:25; *De Tie v. Orange County*, 152 F.3d 1109 (9th Cir. 1998).  
 Court Screening Applied to Paid Suits Too; 6:13; *Martin v. Scott*, 156 F.3d 578 (5th Cir. 1998).  
 Dismissal of Haircut Suits Reversed; 12:25; *Cofer v. Schriro*, 176 F.3d 1082 (8th Cir. 1999); *Williams v. Norris*, 176 F.3d 1089 (8th Cir. 1999).  
 Dismissal with Prejudice for Failure to Exhaust; Prison Must Process Grievance within Time Limits; 2:7; *Underwood v. Wilson*, 151 F.3d 292 (5th Cir. 1998).  
 District Court Can't Dismiss Appeal for Failure to Pay Filing Fee; 5:25; *Sperow v. Melvin*, 153 F.3d 781 (7th Cir. 1998).  
*Duffy v. Riveland*: Some Comments Regarding the Court's January 20, 1998 Summary Judgment Ruling; 2:12; Feldman, Leonard; *Duffy v. Riveland*, Case No. C92-1596R & C93-637R (W.D. Wash.).  
 Error to Dismiss Rule 41(C) Motion Without Allowing Conversion to *Bivens* Action; 6:26; *Peña v. U.S.*, 157 F.3d 984 (5th Cir. 1998).  
 Fact Issue of Physical Injury Precludes Summary Judgment; 9:19; Young, Ronald; *Gomez v. Chandler*, 163 F.3d 921 (5th Cir. 1999).  
 Failure to Give Summary Judgment Notice Is Reversible Error; 4:19; *Rand v. Rowland*, 154 F.3d 952 (9th Cir. 1998) (en banc).  
 FRAP 24 Good Faith Standard Not High; 7:25; *Pate v. Steven*, 163 F.3d 437 (7th Cir. 1998).  
 IFP Application Not Required When Suit Filed; 4:8; *Garrett v.*

*Clarke*, 147 F.3d 745 (8th Cir. 1998).  
 IFP Plaintiffs Must Have Opportunity to Challenge Reasons for "Bad Faith" Certifications; 12:17; *Celske v. Edwards*, 164 F.3d 396 (7th Cir. 1999).  
 Interstate Compact Violations Not Cognizable under § 1983; 6:23; *Ghana v. Pierce*, 159 F.3d 1206 (9th Cir. 1998).  
 Jail Brutality Verdict Reversed Due to Improper Argument and Jury Instruction; 3:23; *Spicer v. Rossetti*, 150 F.3d 642 (7th Cir. 1998).  
 Michigan Department of Corrections Fined \$300,000 in Contempt Case; 4:5; *Glover v. Johnson*, 9 F.Supp.2d 799 (ED MI 1998).  
 Mitigation Instruction and Excluding Indemnification Evidence Reversible Error; 6:16; *Lawson v. Trowbridge*, 153 F.3d 368 (7th Cir. 1998).  
 Motive Question Precludes Summary Judgment in Medical Suit; 8:21; *Davis v. Dorsey*, 167 F.3d 411 (8th Cir. 1999).  
 No Appeal Allowed in Louisiana Consent Decree Dissolution; 4:20; *Hamilton Plaintiffs v. Williams Plaintiffs*, 147 F.3d 367 (5th Cir. 1998).  
 No Interlocutory Appeal on Supervisory Liability When Guard Stabs Prisoner; 7:16; *Smith v. Brenoetsy*, 158 F.3d 908 (5th Cir. 1998).  
 No Leave to Amend Complaint for IFP Litigants; 4:9; *Lopez v. Smith*, 160 F.3d 567 (9th Cir. 1998).  
 PLRA Consent Decree Termination Provision Upheld by 2nd and 3rd Circuits; 8:24; *Imprisoned Citizens Union v. Ridge*, 169 F.3d 178 (2nd Cir. 1999); *Benjamin v. Jacobson*, 172 F.3d 144 (2nd Cir. 1999)(en banc).  
 PLRA Doesn't Affect Court Contempt Powers; 7:10; *Essex County Jail Annex Inmates v. Treffinger*, 18 F.Supp.2d 445 (D NJ 1998).  
 PLRA Doesn't Ban Class Actions; 4:9; *Anderson v. Garner*, 22 F.Supp.2d 1379 (ND GA 1997).  
 PLRA Fee Provisions Apply to All Pending Cases in the Fifth Circuit; 4:8; *Larson v. Scott*, 157 F.3d 1030 (5th Cir. 1998).  
 Prison Officials Waive Untimely Asserted *Heck* Defense; 10:20; *Carr v. O'Leary*, 167 F.3d 1124 (7th Cir. 1999).  
 Prisoner Can Attend His Civil Trial at Government Expense; 9:23; *Hawks v. Timms*, 35 F.Supp.2d 464 (D MD 1999).  
 Prisoner May Not File Unsigned Complaint for Another Prisoner; 6:26; *Gonzales v. Wyatt*, 157 F.3d 1016 (5th Cir. 1998).  
 Pro Se IFP Litigant Entitled to Amend Suit in Second Circuit; 8:23; *Gomez v. USAA Federal Savings Bank*, 171 F.3d 794 (2nd Cir. 1999).  
 Pro Se Tips and Tactics (Civil Appeals); 12:4; Midgley, John.  
 Pro Se Tips and Tactics (Discovery); 10:6; Midgley, John.  
 Pro Se Tips and Tactics (Discovery); 6:8; Midgley, John.  
 Retaliatory Verdict Remanded for Damages; 12:26; *Trobaugh v. Hall*, 176 F.3d 1087 (8th Cir. 1999).  
 Seizure of Trust Account Interest Violates Takings Clause; 4:26; *Schneider v. California Dept. of Corrections*, 151 F.3d 1194 (9th Cir. 1998).  
 Seventh Circuit Clarifies Good Faith Appeal Standard, Again; 8:27; *Hyche v. Christensen*, 170 F.3d 769 (7th Cir. 1999).  
 Seventh Circuit Defines Court Access Claims Involving Property; 4:18; *Nance v. Vierrege*, 147 F.3d 589 (7th Cir. 1998).  
 Stun Belts in Court Unconstitutional; 9:24; *Hawkins v. Comparet-Cassani*, 33 F.Supp.2d 1244 (CD CA 1999).  
 Texas Courts Must Hold Hearing Before Dismissing Suit for Having No Arguable Basis in Fact; 7:20; *Lentworth v. Traham*, 981 SW2d 720 (Tex.App. Houston 1st Dist. 1998).  
 Trial Required in Wisconsin Excessive Force Suit; 2:21; *Kapfhammer v. Boyd*, 5 F.Supp.2d 689 (ED WI 1999).  
 Warden May Be Liable for Rape; 3:22; *Spruce v. Sargent*, 149 F.3d 783 (8th Cir. 1998).  
 Washington EFV Cut-Off Date Questioned; 7:23; *Daniel v. Rolfs*, 29 F.Supp.2d 1184 (ED WA 1998).

Washington Gift Subscription Ban Injunction Affirmed; 7:13.

## Commentary

A Nation's Gratitude; 5:6; Abu-Jamal, Mumia.  
 Cheaper Than Lab Rats: Can Prisoners Glow in the Dark?; 3:1; Sherrer, Hans.  
 Go Directly to Jail: At the Academy in Alpharetta, Men Pay Big Bucks to Pretend They're in Prison; 10:16; Savage, Dan.  
 Notes from the Unrepententary; 12:10; Evans, Linda.  
 Notes from the Unrepententary; 8:6; Whitehorn, Laura.  
 Notes from the Unrepententary; 2:5; Whitehorn, Laura.  
 Notes from the Unrepententary; 6:6; Whitehorn, Laura.  
 The Cultural Commodification of Prisons; 11:1; Wright, Paul.  
 They Killed a Man, Not a Number; 6:12; Hill, David.  
 Trouble in Mind: ADX—The Fourth Year; 4:10; Levasseur, Ray Luc.  
 "Victims' Rights" as a Stalkinghorse for State Repression; 8:1; Wright, Paul.  
 Worst of the Worst?; 10:4.

## Conditions of Confinement

\$4,000 Awarded to Paraplegic Prisoners Segregated Under Improper Conditions; 5:24; *Simmons v. Cook*, 154 F.3d 805 (8th Cir. 1998).  
 \$45,000 Award in BOP Tort Claim Medical Neglect Suit; 4:22; *Muhammed v. U.S.*, 6 F.Supp.2d 582 (ND Tex. 1998).  
 Arizona DOC Settles Sexual Abuse Suit; 10:9.  
 CCA Settles Youngstown Suit for \$2.48 Million; 8:14; *In Re Northeast Ohio Correctional Centers*, USDC ND OH, 4:97:CV-1995.  
 Contaminated Water Claim Not Barred by PLRA Physical Injury Rule; 8:26; *Robinson v. Page*, 170 F.3d 747 (7th Cir. 1999).  
 Corcoran Prisoner Left Hanging; 6:7.  
 CSC Cancels Florida Juvenile Facility Contract; 12:11.  
 Denial of Exercise Is "Atypical and Significant"; 9:28; *Bass v. Perrin*, 170 F.3d 1312 (11th Cir. 1999).  
 Evidentiary Hearing Allowed in PLRA Consent Decree Terminations; 11:22; *Cagle v. Hutto*, 177 F.3d 253 (4th Cir. 1999).  
 Failing to Provide Disabled Prisoner Showers for Two Months Cruel and Unusual; 6:13; *Bradley v. Puckett*, 157 F.3d 1022 (5th Cir. 1998).  
 Federal Judge Rules Texas Prisons Still Unconstitutional, PLRA Unconstitutional; 6:1; Clarke, Matthew T.; *Ruiz v. Johnson*, 37 F.Supp.2d 855 (SD TX 1999).  
 Florida Nicotine Addiction Suit Settled; 3:15; *Waugh v. Singletary*, USDC MD FL (Jacksonville), 95-605-CIV-J-20A.  
 Human Feces in California Prison's Water; 7:6; Wisely, Willie.  
 Imminent Danger Overrides Three Strikes; 6:18; *Gibbs v. Cross*, 160 F.3d 962 (3rd Cir. 1998).  
 Individual Capacity Claims Not Applicable to RA and ADA; 8:16; *Montez v. Romer*, 32 F.Supp.2d 1235 (D Colo. 1999).  
 Judicial Sentence of Life in Solitary Upheld; 3:21; *United States v. Felipe*, 148 F.3d 101 (2nd Cir. 1998).  
 Juvenile Crime Still Pays — But at What Cost?; 1:1; Friedmann, Alex.  
 Medical Care Unconstitutional in Puerto Rico Prisons; 4:3; *Morales Feliciano v. Rossello Gonzalez*, 13 F.Supp.2d 151 (D. Puerto Rico 1998).  
 Michigan's Female Prisoners Have Educational Parity; 10:15; *Glover v. Johnson*, 35 F.Supp.2d 1010 (ED MI 1999).  
 New Jersey Jail Settles Chemical Burn Suit for \$900,000; 12:16; *Zamot v. County of Atlantic County*, USDC D NJ, Camden Vicinage, 97-CV-4220.  
 No Court Access Right to Litigate Civil Forfeiture; 9:21; *Wilson v. Blankenship*, 163 F.3d 1284 (11th Cir. 1998).

Ohio Prisons Cited by EPA; 7:8; Cahill, Dan.  
 Physical Injury Rule Applied to Pre-PLRA Asbestos Exposure; 8:13; *Fontroy v. Owens*, 150 F.3d 239 (3rd Cir. 1998).  
 PLRA Dismissals for Failure to Plead Physical Injury Reviewed De Novo; 9:27; *Perkins v. Kansas Dept. of Corrections*, 165 F.3d 803 (10th Cir. 1999).  
 Prisoner Withstands Summary Judgment on Cell Condition Claim; 12:26; *Harsen v. Garratt*, 29 F.Supp.2d 272 (ED Va. 1998).  
 Punitive Shackling Without a Hearing Okay; 12:17; *Key v. McKinney*, 176 F.3d 1083 (8th Cir. 1999).  
 Settlement in Deaf Washington State Prisoners' Lawsuit; 2:12; Crollard, Jeff; *Duffy v. Riveland*, Case No. C92-1596R & C93-637R (W.D. Wash.).  
 Sleep Deprivation Not Frivolous Claim; 12:23; Young, Ronald; *Harper v. Showers*, 174 F.3d 716 (5th Cir. 1999).  
 Strip Mining Human Rights in Virginia's Supermax Dungeons; 7:1; Pens, Dan.  
 Texas Prison Warehouses (Letter); 9:9; Hoffman, D.G. "Tex".  
 Texas Settles with Hanged Prisoner's Family; 10:19.  
 Tobacco Smoke Exposure Requires Trial; 9:17; *McPherson v. Coombe*, 29 F.Supp.2d 141 (WD NY 1998).  
 Utah Strip Search Suit Settled; 1:11; *Hansen v. Jorgensen*, USDC Utah, Case No. 91-CV-991.  
 Violence Takes a Toll at New Mexico Wackenhut Prison; 6:12; Young, Ronald.  
 Virginia Prison "Fire Trap" Finding Reversed; 2:9.  
 Warden's Smoking Ban Violates BOP Rules; 6:22; *Webber v. Crabtree*, 158 F.3d 460 (9th Cir. 1998).

### Consent Decrees

Alabama Prison Officials Held in Contempt Again; 10:23; *Chairs v. Burgess*, 25 F.Supp.2d 1333 (ND Ala. 1998).  
 Attorney Fee Cap Inapplicable to Pre-PLRA Suits; PLRA Automatic Stay Provisions Constitutional; 2:6; *Hadix v. Johnson*, 144 F.3d 925 (6th Cir. 1998); *Hadix v. Johnson*, 143 F.3d 246 (6th Cir. 1998).  
 Eleventh Circuit Upholds Constitutionality of PLRA's Automatic Termination Provision; 12:18; *Nichols v. Hopper*, 173 F.3d 820 (11th Cir. 1999).  
 En Banc Review Granted in *Taylor*; 1:5; *Taylor v. United States*, 162 F.3d 547 (9th Cir. 1998).  
 Failure to Give Summary Judgment Notice Is Reversible Error; 4:19; *Rand v. Rowland*, 154 F.3d 952 (9th Cir. 1998)(en banc).  
 Ninth Circuit Vacates Previous Opinion Ruling PLRA's Provision Unconstitutional; 12:12; *Taylor v. United States*, 181 F.3d 1017 (9th Cir. 1999)(en banc).  
 No Appeal Allowed in Louisiana Consent Decree Dissolution; 4:20; *Hamilton Plaintiffs v. Williams Plaintiffs*, 147 F.3d 367 (5th Cir. 1998).  
 Pennsylvania Consent Decrees Terminated Under PLRA; 3:13; *Vazquez v. Carver*, 18 F.Supp. 2d 503 (ED PA 1998); *Imprisoned Citizens Union v. Shapp*, 11 F.Supp. 2d 586 (ED PA 1998).  
 PLRA Consent Decree Termination Provision Upheld by 2nd and 3rd Circuits; 8:24; *Benjamin v. Jacobson*, 172 F.3d 144 (2nd Cir. 1999)(en banc); *Imprisoned Citizens Union v. Ridge*, 169 F.3d 178 (2nd Cir. 1999).  
 PLRA Immediate Termination Provisions Unconstitutional; 1:5; *Denike v. Fauver*, 3 F.Supp.2d 540 (D NJ 1998).

### Court Access

Georgia Court Access Consent Decree Terminated; 10:8; Schirato, Christopher; *Lewis v. Evans*, USDC SD GA, Savannah Division, Case No. CV484-251.  
 Iowa to Close Prison Law Libraries; 7:7.  
 Lack of Standing Eviscerates Court Access Class Action; 9:25; *Walters v. Edgar*, 163 F.3d 430 (7th Cir. 1998).

No Court Access Right to Litigate Civil Forfeiture; 9:21; *Wilson v. Blankenship*, 163 F.3d 1284 (11th Cir. 1998).  
 No Right to Mutual Legal Assistance in 11th Circuit; 2:22; *Bass v. Singletary*, 143 F.3d 1442 (11th Cir. 1998).  
 Pennsylvania Ban on Writing by Mumia Abu-Jamal Enjoined; 5:5; *Abu-Jamal v. Price*, 154 F.3d 128 (3rd Cir. 1998).  
 Physical Injury Requirement Doesn't Apply to Court Access Claims; 9:19; *Lewis v. Sheahan*, 35 F.Supp.2d 633 (ND IL 1999).  
 Prisoner Can Attend His Civil Trial at Government Expense; 9:23; *Hawks v. Timms*, 35 F.Supp.2d 464 (D MD 1999).  
 Request for Telephonic Appearance Must Be Considered; 11:24; *State Bureau of Child Support Services v. Garcia*, 975 P.2d 793 (Idaho App. 1999).  
 Retaliatory Acts Need Not "Shock the Conscience" to be Actionable; 11:18; Clarke, Matthew T.; *Thaddeus-X v. Blatter*, 175 F.3d 378 (6th Cir. 1999)(en banc).  
 Seventh Circuit Defines Court Access Claims Involving Property; 4:18; *Nance v. Vierrege*, 147 F.3d 589 (7th Cir. 1998).  
 South Dakota Eliminates Law Libraries; 12:19.  
 Stun Belts in Court Unconstitutional; 9:24; *Hawkins v. Comparet-Cassani*, 33 F.Supp.2d 1244 (CD CA 1999).

### Death Penalty

California Gas Chamber Ruling Vacated; 2:13; *Fierro v. Terhune*, 147 F.3d 1158 (9th Cir. 1998).  
 Daring Death Row Escape Shakes up Texas; 4:13.  
 Death Row Eulogy; 10:3; Van Poyck, William.  
 Insanity, Brutality and Fatality: Florida's X-Wing Marks the End of the Line; 10:1; Pens, Dan.  
 Prisoners Have First Amendment Right to Private Conversations with Their Attorneys; 9:21; *Williams v. Price*, 25 F.Supp.2d 623 (WD PA 1998).  
 They Killed a Man, Not a Number; 6:12; Hill, David.

### Disciplinary Hearings

180 Days in SHU Not "Atypical and Significant"; 5:23; *Black v. Selksy*, 15 F.Supp.2d 311 (WD NY 1998).  
 376 Days in New York Seg "Atypical and Significant" Hardship; 7:25; *Lee v. Coughlin*, 26 F.Supp.2d 615 (SD NY 1998).  
 Administrative Exhaustion Doesn't Include Judicial Remedies; 3:12; *Jenkins v. Morton*, 148 F.3d 257 (3rd Cir. 1998).  
 De Facto Ban on Live Testimony Unconstitutional; 4:14; *Whitlock v. Johnson*, 153 F.3d 380 (7th Cir. 1998).  
*Duffy v. Riveland*: Some Comments Regarding the Court's January 20, 1998 Summary Judgment Ruling; 2:12; Feldman, Leonard; *Duffy v. Riveland*, Case No. C92-1596R & C93-637R (W.D. Wash.).  
*Edwards* No Bar to Seg Suit; 7:22; *Johnson v. Freeburn*, 29 F.Supp.2d 764 (ED MI 1998).  
 Felony Trial for Planted Knife Is Malicious Prosecution; 2:5; *Klein v. Coblenz*, No. 96-1289 (10th Cir. 1998).  
*Franklin* Reversed; DC Prisoners Have No Right to Qualified Interpreters; 8:17; *Franklin v. District of Columbia*, 163 F.3d 625 (DC Cir. 1999); *Franklin v. District of Columbia*, rehearing denied, 168 F.3d 1360 (DC Cir. 1999).  
 Full Court Overrules *Clarke v. Stalder* in Part; 3:18; *Clarke v. Stalder*, 154 F.3d 186 (5th Cir. 1998)(en banc).  
*Heck* Doesn't Apply after Release from Prison; 8:25; *White v. Phillips*, 34 F.Supp.2d 1038 (WD LA 1998).  
*Heck* Not Applicable to Ad Seg; Only "Available" Exhaustion Required; 11:17; *York v. Huerta-Garcia*, 36 F.Supp.2d 1231 (SD CA 1999).  
 Infraction Inadmissible at Criminal Trial; 7:18; *United States v. Thomas*, 155 F.3d 833 (7th Cir. 1998).

Interstate Compact Violations Not Cognizable under § 1983; 6:23; *Ghana v. Pierce*, 159 F.3d 1206 (9th Cir. 1998).  
 New York Prisoners Have Right to Staff Assistance and Witness Testimony; 4:16; *Ayers v. Ryan*, 152 F.3d 77 (2nd Cir. 1998).  
 New York Retaliation Suit Nets \$100,000 in Damages; 11:13.  
 New York Work Release Suit Dismissed; 7:22; *Roucchio v. Coughlin*, 29 F.Supp.2d 72 (ED NY 1998).  
 Ninth Circuit Vacates Previous Opinion Ruling PLRA's Provision Unconstitutional; 12:12; *Taylor v. United States*, 181 F.3d 1017 (9th Cir. 1999)(en banc).  
 Pardon Satisfies *Heck*; 6:17; *Wilson v. Lawrence Co., Missouri*, 154 F.3d 757 (8th Cir. 1998).  
 Prison Officials Waive Untimely Asserted *Heck* Defense; 10:20; *Carr v. O'Leary*, 167 F.3d 1124 (7th Cir. 1999).  
 Retaliatory Beating of Prisoner Is Triable Fact Issue; 3:25; *Mahotep v. DeLuca*, 3 F.Supp. 2d 385 (ND NY 1998).  
*Sandin* Does Not Apply to Pretrial Detainees; 12:22; *Rapier v. Harris*, 172 F.3d 999 (7th Cir. 1999).  
 Scott Superceded; 2:11; *Scott v. Albury*, 156 F.3d 283 (2nd Cir. 1998).  
 Second Circuit Discusses *Heck* and *Edwards*; 11:21; *Jenkins v. Haulbert*, 179 F.3d 19 (2nd Cir. 1999).  
 Tennessee Supreme Court Upholds Private Prison Disciplinary Procedures; 9:12; *Mandela v. Campbell*, 978 S.W.2d 531 (Tenn. 1998).  
 Twenty-Four Hour Notice of Disciplinary Charges Required; 4:25; *Evans v. Deuth*, 8 F.Supp.2d 1135 (ND IN 1998).  
 Washington Felony Infraction Law Struck Down; 11:23; *State v. Brown*, 977 P.2d 1242, 95 Wa.App. 952 (Wa.App.Div.3, 1999).  
*Wright* Dismissed on Remand; 9:20; *Wright v. Coughlin*, 31 F.Supp.2d 301 (WD NY 1998).

### Disclosure of Records

BOP Violent Offender Notification Policy Overinclusive; 4:25; *Royce v. Hahn*, 151 F.3d 116 (3rd cir. 1998).  
 California Illegally Dumps Parole Records; 11:14; Wisely, Willie.  
 No Privacy Rights for Sex Offender Registrants; 11:9; *Paul P. v. Verniero*, 170 F.3d 396 (3rd Cir. 1999).  
 PLRA Physical Injury Requirement Constitutional; 9:16; Quigley, James; *Davis v. District of Columbia* 158 F.3d 1342 (DC Cir. 1998).  
 Public Access to Documents Resources; 5:9; Wright, Paul.

### Eighth Amendment

\$1,500 in Disabled Prisoner Work Suit; 4:23; *Williams v. Norris*, 148 F.3d 983 (8th Cir. 1998).  
 \$250,000 FTCA Beating Judgment Reversed; 4:29; *Cohen v. U.S.*, 151 F.3d 1338 (11th Cir. 1998).  
 \$4,000 Awarded to Paraplegic Prisoners Segregated Under Improper Conditions; 5:24; *Simmons v. Cook*, 154 F.3d 805 (8th Cir. 1998).  
 \$90,000 Settlement in Utah Jail Suicide; 10:14; *Estate of Henry Delgado v. Salt Lake County*, USDC D UT, 2:99-CV-39-B.  
 Amended Complaint Filed Outside Limitations Period Relates Back; 11:16; *Daily v. Monte*, 26 F.Supp.2d 984 (ED Mich. 1998).  
 Beaten Attica Prisoner Awarded \$70,000; 12:5.  
 Cane Seizure Can Violate Eighth Amendment; 4:29; *Rosales v. Coughlin*, 10 F.Supp.2d 261 (WD NY 1998).  
 Contaminated Water Claim Not Barred by PLRA Physical Injury Rule; 8:26; *Robinson v. Page*, 170 F.3d 747 (7th Cir. 1999).  
 Denial of Exercise Is "Atypical and Significant"; 9:28; *Bass v. Perrin*, 170 F.3d 1312 (11th Cir. 1999).  
 Denial of Pain Medication Violates Eighth Amendment; 8:20; *Ralston v. McGovern*, 167 F.3d 1160 (7th Cir. 1999).  
 Eighth Amendment Applies to Escaped Convicts; 3:17; *Gravely v.*

*Madden*, 142 F.3d 345 (6th Cir. 1998).  
 Fact Issue of Physical Injury Precludes Summary Judgment; 9:19; Young, Ronald; *Gomez v. Chandler*, 163 F.3d 921 (5th Cir. 1999).  
 Failing to Provide Disabled Prisoner Showers for Two Months Cruel and Unusual; 6:13; *Bradley v. Puckett*, 157 F.3d 1022 (5th Cir. 1998).  
 Federal Judge Rules Texas Prisons Still Unconstitutional, PLRA Unconstitutional; 6:1; Clarke, Matthew T.; *Ruiz v. Johnson*, 37 F.Supp.2d 855 (SD TX 1999).  
 Fifth Circuit Says Rotting to Death in Prison Okay; 12:20; Young, Ronald; *Stewart v. Murphy*, 174 F.3d 530 (5th Cir. 1999).  
 Guard's Death Threats May Violate Eighth Amendment; 1:8; *Chandler v. D.C. Department of Corrections*, 145 F.3d 1355 (DC Cir. 1998).  
 Illegal Detention Violates Substantive Due Process; 4:15; *Armstrong v. Squadrito*, 152 F.3d 564 (7th Cir. 1998).  
 Jury Awards \$2.3 Million for Slain San Quentin Prisoner, State Settles for \$2.5 Million; 5:3; Wisely, Willie.  
 Jury Awards \$8,000 in California Prison Assault; 4:16; *Garcia v. Pozzi*, USDC ED CA, CIV-S-95-0009-DADP.  
 Jury Awards Beaten Texas Prisoner \$250,000; 8:13; *Sikes v. Gaytan*, USDC \_\_\_\_ TX Court no. 95-CA-1.300PMA.  
 No Immunity for Forcing Disabled Prisoner to Work; 1:9; *Sanchez v. Taggart*, 144 F.3d 1154 (8th Cir. 1998).  
 No Interlocutory Appeal on Supervisory Liability When Guard Stabs Prisoner; 7:16; *Smith v. Brenoettsy*, 158 F.3d 908 (5th Cir. 1998).  
 Physical Injury Rule Applied to Pre-PLRA Asbestos Exposure; 8:13; *Fontroy v. Owens*, 150 F.3d 239 (3rd Cir. 1998).  
 PLRA Allows Fees on Fees in Failure to Protect Suit; 1:5; *Hernandez v. Kalinowski*, 146 F.3d 196 (3rd Cir. 1998).  
 PLRA Dismissals for Failure to Plead Physical Injury Reviewed De Novo; 9:27; *Perkins v. Kansas Dept. of Corrections*, 165 F.3d 803 (10th Cir. 1999).  
 Prisoner Must Show Imminent Danger at Time of IFP Request to Avoid PLRA Three-Strikes Dismissal; 5:10; *Choyce v. Dominguez*, 160 F.3d 1068 (5th Cir. 1998).  
 Prisoner Withstands Summary Judgment on Cell Condition Claim; 12:26; *Harsen v. Garratt*, 29 F.Supp.2d 272 (ED Va. 1998).  
 Pro Se Pennsylvania Prisoner Awarded \$100,000 in Guard Attack; 9:13; *Henderson v. Mazurkiewicz*, USDC MD PA, 4:CV-97-250.  
 Pro Se Texas Prisoner Awarded \$1.08 Million in Failure to Protect Suit; 10:10.  
 Punitive Shackling Without a Hearing Okay; 12:17; *Key v. McKinney*, 176 F.3d 1083 (8th Cir. 1999).  
 Qualified Immunity in Transsexual Treatment Case; 7:21; *Farmer v. Moritsugu*, 163 F.3d 610 (DC Cir. 1998).  
 Retaliatory Acts Need Not "Shock the Conscience" to be Actionable; 11:18; Clarke, Matthew T.; *Thaddeus-X v. Blatter*, 175 F.3d 378 (6th Cir. 1999)(en banc).  
 Sheriff Liable for Inadequate Staffing and Refusing Medical Treatment to Assaulted Prisoner; 11:20; *Lopez v. LeMaster*, 172 F.3d 756 (10th Cir. 1999).  
 Sleep Deprivation Not Frivolous Claim; 12:23; Young, Ronald; *Harper v. Showers*, 174 F.3d 716 (5th Cir. 1999).  
 Tennessee Prison Guard to Pay \$50,000 for Stabbing; 12:13.  
 Tobacco Smoke Exposure Requires Trial; 9:17; *McPherson v. Coombe*, 29 F.Supp.2d 141 (WD NY 1998).  
 Trial Required in Jail Attack; 11:25; *Baker v. Willett*, 42 F.Supp.2d 192 (ND NY 1999).  
 Warden May Be Liable for Rape; 3:22; *Spruce v. Sargent*, 149 F.3d 783 (8th Cir. 1998).  
 Withholding Dental Care Violates Eighth Amendment; 7:15; Young, Ronald; *Ramos v. O'Connell*, 28 F.Supp.2d 796 (WD NY 1998).

## Evidentiary Ruling

\$15,001 Excessive Force Verdict Affirmed; 1:12; *Williams v. Drake*, 146 F.3d 44 (1st Cir. 1998).  
Eighth Circuit Reinstates \$80,000 Damage Award in Rape Case; 2:19; *Berry v. Oswalt*, 143 F.3d 1127 (8th Cir. 1998).  
Infraction Inadmissible at Criminal Trial; 7:18; *United States v. Thomas*, 155 F.3d 833 (7th Cir. 1998).

## Excessive Force

\$15,001 Excessive Force Verdict Affirmed; 1:12; *Williams v. Drake*, 146 F.3d 44 (1st Cir. 1998).  
Abuse of Prisoners Confirmed at CCA Facility; 2:18.  
Beaten Attica Prisoner Awarded \$70,000; 12:5.  
Beaten Connecticut Jail Detainee Awarded \$2.07 Million; 9:10.  
California Changes Shooting Policy; 11:8; Wisely, Willie.  
CDC Settles Corcoran Shooting Suit for \$2.2 Million; 12:9.  
CDC Settles Excessive Force Suit for \$1,000; 10:14; Gann, John; *Gann v. Lytle* USDC ED CA, CIV-S-95-0022LKK-JFM  
Concealment of Info Tolls Statute of Limitations; 10:19; *Blaskiewicz v. County of Suffolk*, 29 F.Supp.2d 134 (ED NY 1998).  
Consenting to Have Magistrate Conduct Trial Not Waiver to Right to Jury Trial; 5:25; *Jennings v. McCormick*, 154 F.3d 542 (5th Cir. 1998).  
"Corcoran East" Opens in Virginia; 1:4.  
Corcoran Shooting Death Suit Settled for \$825,000; 5:18; *Estate of Preston Tate v. Gomez*, USDC ED CA, CV-F-95-5239-DLB.  
Death Row Eulogy; 10:3; Van Poyck, William.  
Detainee Beaten to Death at Nassau County Jail; 7:9; Friedmann, Alex.  
Fact Issue of Physical Injury Precludes Summary Judgment; 9:19; Young, Ronald; *Gomez v. Chandler*, 163 F.3d 921 (5th Cir. 1999).  
FBI Investigates CCA-Run INS Center in New Jersey; 10:10.  
Federal Judge Rules Texas Prisons Still Unconstitutional, PLRA Unconstitutional; 6:1; Clarke, Matthew T.; *Ruiz v. Johnson*, 37 F.Supp.2d 855 (SD TX 1999).  
Florida Guards Acquitted in Brutality Case; 7:3; Friedmann, Alex.  
Florida Jail Guard Found Guilty in Prisoner's Death; 10:11.  
Florida Prison Erupts; 7:12.  
Grand Jury Reverses Indictment Against Jailers; 5:17.  
Guard Guilty of Penis Stomping; 7:11; *United States v. Walsh*, 27 F.Supp.2d 186 (WD NY 1998).  
Insanity, Brutality and Fatality: Florida's X-Wing Marks the End of the Line; 10:1; Pens, Dan.  
Jail Brutality Verdict Reversed Due to Improper Argument and Jury Instruction; 3:23; *Spicer v. Rossetti*, 150 F.3d 642 (7th Cir. 1998).  
Judge Throws Out Corcoran Sanctions; 6:14; Wisely, Willie.  
Jury Awards \$2.3 Million for Slain San Quentin Prisoner, State Settles for \$2.5 Million; 5:3; Wisely, Willie.  
Jury Awards Beaten Texas Prisoner \$250,000; 8:13; *Sikes v. Gaytan*, USDC TX Court no. 95-CA-1.300PMA.  
*Maximum Security University*, edited by Tom Quinn (Book and Video Review); 12:8; Fischer, Bob; Stanton, Janet; Wright, Paul.  
Missouri Proposes \$2.2 Million Settlement; 9:11.  
New York Jail Brutality Suit Settled for \$3,500; 4:23; *Massey v. City of New York, et al.*; USDC SD NY, 97CIV-7607(LAP).  
No Admin. Exhaustion Required for Monetary Claims; No Qual. Immunity for Malicious Use of Force; 3:12; *Holliman v. DeTella*, 6 F.Supp. 2d 968 (ND IL 1998); *Jackson v. DeTella*, 998 F.Supp. 901 (ND IL 1998).  
No Interlocutory Appeal on Supervisory Liability When Guard Stabs Prisoner; 7:16; *Smith v. Brenoettsy*, 158 F.3d 908 (5th Cir. 1998).  
No Qualified Immunity for Texas Sheriff and CCRI Guards Who Abused Missouri Prisoners; 8:18; Clarke, Matthew T.; *Kesler v.*

*King*, 29 F.Supp.2d 356 (SD Tex. 1998).  
Pelican Bay Guard Indicted in Shooting; 12:13; Wisely, Willie.  
Pennsylvania Brutality Suit Settled for \$5,000; 6:19; *DeJesus v. Peters*, USDC ED PA, 95-1005.  
PLRA Attorney Fee Cap Applies in \$65,000 Beating Case; 8:25; *Roberson v. Brassell*, 29 F.Supp.2d 346 (SD Tex. 1998).  
Pro Se Pennsylvania Prisoner Awarded \$100,000 in Guard Attack; 9:13; *Henderson v. Mazurkiewicz*, USDC MD PA, 4:CV-97-250.  
Retaliatory Beating of Prisoner Is Triable Fact Issue; 3:25; *Mahotep v. DeLuca*, 3 F.Supp. 2d 385 (ND NY 1998).  
Rikers Island Brutality Suit Settled; 2:16; Chasan, Jonathan; *Sheppard v. Phoenix*, USDC SD NY 91-civ-4148 (RPP).  
Strip Mining Human Rights in Virginia's Supermax Dungeons; 7:1; Pens, Dan.  
Stun Belts in Court Unconstitutional; 9:24; *Hawkins v. Comparet-Cassani*, 33 F.Supp.2d 1244 (CD CA 1999).  
Trial Required in Jail Attack; 11:25; *Baker v. Willett*, 42 F.Supp.2d 192 (ND NY 1999).  
Trial Required in Wisconsin Excessive Force Suit; 2:21; *Kapfhammer v. Boyd*, 5 F.Supp.2d 689 (ED WI 1998).  
Virginia Juvenile Dies of Accidental Heart Attack; 12:12; Pens, Dan.  
Washington Prisoners Brutalized in Colorado Private Prison; 6:10.

## Federal Statutory Law

\$250,000 FTCA Beating Judgment Reversed; 4:29; *Cohen v. U.S.*; 151 F.3d 1338 (11th Cir. 1998).  
\$45,000 Award in BOP Tort Claim Medical Neglect Suit; 4:22; *Muhammed v. U.S.*; 6 F.Supp.2d 582 (ND Tex. 1998).  
BOP Erred in Denying Early Release Eligibility; 8:20; *Byrd v. Crabtree*, 22 F.Supp.2d 1128 (D Or 1998); *Gavis v. Crabtree*, 28 F.Supp.2d 1264 (D Or 1998); *Hicks v. Brooks*, 28 F.Supp.2d 1268 (D Colo 1998); *Bowen v. Crabtree*, 22 F.Supp.2d 1131 (D Or 1998).  
BOP Erred in Running State Sentence Consecutive to Federal Sentence; 7:18; *Cozine v. Crabtree*, 15 F.Supp.2d 997 (D Or 1998).  
BOP Exceeds Statutory Authority in Denying Sentence Reductions; 1:9; *Fristoe v. Thompson*, 144 F.3d 627 (10th Cir. 1998).  
BOP Sentence Reduction Exclusion Based on INS Detainer Upheld; 10:25; Young, Ronald; *McLean v. Crabtree*, 173 F.3d 1176 (9th Cir. 1999).  
BOP Violent Offender Notification Policy Overinclusive; 4:25; *Royce v. Hahn*, 151 F.3d 116 (3rd cir. 1998).  
DC Circuit Lifts Injunction on BOP Porn Ban; 9:17; *Amatel v. Reno*, 156 F.3d 192 (DC Cir. 1998).  
Federal Parolee Has Right to Hearing Under 18 USC § 4211(a)(2); 9:25; *Valona v. US Parole Com'n*, 165 F.3d 508 (7th Cir. 1998).  
Feds Not Obligated to Accept State-Ordered Concurrent Sentence; 10:22; Young, Ronald; *Jake v. Herschberger*, 173 F.3d 1059 (7th Cir. 1999).  
Felon Possession of Firearm Nonviolent Offense; 6:26; *Orr v. Hawk*, 156 F.3d 651 (6th Cir. 1998).  
Judicial Sentence of Life in Solitary Upheld; 3:21; *United States v. Felipe*, 148 F.3d 101 (2nd Cir. 1998).  
Private Prison Denied Wiretap Exception; 9:20; *Huguenin v. Ponte*, 29 F.Supp.2d 57 (D RI 1998).  
US District Courts Have No Authority to Grant or Deny Credit Toward Sentence; 4:21; *United States v. Whaley*, 148 F.3d 305 (2nd Cir. 1998).  
Warden Used "Force" in Sexual Assault; 8:12; *United States v. Lucas*, 157 F.3d 998 (5th Cir. 1998).  
Washington Gift Subscription Ban Injunction Affirmed; 7:13.  
Weapon Possession in Federal Prison Always Considered a "Violent Offense"; 6:23; *United States v. Vahovick*, 160 F.3d 395 (7th Cir. 1998).

## Frivolous Litigation

Frivolous Qualified Immunity Appeals Warrant Sanctions; 8:16; *Berryman v. Rieger*, 150 F.3d 561 (6th Cir. 1998).  
PLN Writer Settles Nude Photo Suit for \$3,000; 2:14; *Quigley v. Atmore, et al*, USDC 95-1138-Civ-T-24E (M.D.Fla.).  
PLRA "Three Strikes" Provision Upheld; 3:13; *Young v. Miller*, 144 F.3d 1298 (10th Cir. 1998); *Evans v. Illinois DOC*, 150 F.3d 810 (7th Cir. 1998); *Ashley v. Dilworth*, 147 F.3d 715 (8th Cir. 1998).  
State Court Dismissals Don't Count as Strikes; 9:18; *Freeman v. Lee*, 30 F.Supp.2d 52 (D DC 1998).  
Third Circuit Holds 28 USC § 1915(g) Does Not Apply Retroactively; 9:18; *Gibbs v. Ryan*, 160 F.3d 160 (3rd Cir. 1998).  
Three Strikes Upheld by Ninth Circuit; 9:18; *Rodriguez v. Cook*, 169 F.3d 1176 (9th Cir. 1999).

## Gang Policies

Jury Awards \$8,000 in California Prison Assault; 4:16; *Garcia v. Pozzi*, USDC ED CA, CIV-S-95-0009-DADP.

## Good Time

BOP Erred in Denying Early Release Eligibility; 8:20; *Bowen v. Crabtree*, 22 F.Supp.2d 1131 (D Or 1998); *Hicks v. Brooks*, 28 F.Supp.2d 1268 (D Colo 1998); *Gavis v. Crabtree*, 28 F.Supp.2d 1264 (D Or 1998); *Byrd v. Crabtree*, 22 F.Supp.2d 1128 (D Or 1998).  
BOP Exceeds Statutory Authority in Denying Sentence Reductions; 1:9; *Fristoe v. Thompson*, 144 F.3d 627 (10th Cir. 1998).  
BOP Sentence Reduction Exclusion Based on INS Detainer Upheld; 10:25; *Young, Ronald*; *McLean v. Crabtree*, 173 F.3d 1176 (9th Cir. 1999).  
Denial of Good Time Because of Jury Sentencing Choice Violates Equal Protection; 4:21; *Stefanoff v. Hays County, Tex.*, 154 F.3d 523 (5th Cir. 1998).  
Felon Possession of Firearm Nonviolent Offense; 6:26; *Orr v. Hawk*, 156 F.3d 651 (6th Cir. 1998).  
Kansas Good Time Forfeiture Violates Ex Post Facto; 7:17; *Garner v. Nelson*, 963 P.2d 1242 (Kan. App. 1998).  
Kansas Good Time Rules Violate Ex Post Facto; 3:20; *Bankes v. Simmons*, 963 P.2d 412 (Kansas 1998); *Stansbury v. Hannigan*, 960 P.2d 227 (Kansas 1998).  
No Credit for Time Served on Wrongful Conviction; 2:19; *United States v. Jeanes*, 150 F.3d 483 (5th Cir. 1998).  
Retroactive Kansas Good Time Recalculation Unlawful; 3:20; *Steltzen v. McKune*, No. 77,897 (Kansas Court of Appeals 9-5-97, unpub).  
US District Courts Have No Authority to Grant or Deny Credit Toward Sentence; 4:21; *United States v. Whaley*, 148 F.3d 305 (2nd Cir. 1998).  
Washington Good Time Ban Unconstitutional; 12:27; *State v. Cloud*, 95 Wn.App. 606, 976 P.2d 649 (Wa.App.Div. 1, 1999).

## Guard/DOC Misconduct

Abuse of Prisoners Confirmed at CCA Facility; 2:18.  
Arkansas Department of Corruption Revealed; 9:7; *Campbell v. Arkansas DOC*, 155 F.3d 950 (8th Cir. 1998).  
Beaten Attica Prisoner Awarded \$70,000; 12:5.  
California Guards Indicted in Rapes; 2:8; Wisely, Willie.  
CCPOA Pimping in the California State Assembly; 11:9; Pens, Dan.  
CDC Settles Corcoran Shooting Suit for \$2.2 Million; 12:9.  
CDC Whistleblower Gets \$1.7 Million; 10:23.  
Construction Audit Criticizes Oregon DOC; 12:18.  
Corcoran Bad Apple Rehired; 11:13; Wisely, Willie.  
County Jail Political Shenanigans, Corruption Revealed; 9:7; *Knight v. Vernon*, 23 F.Supp.2d 634 (MD NC 1998).

Death Row Eulogy; 10:3; Van Poyck, William.  
Detainee Beaten to Death at Nassau County Jail; 7:9; Friedmann, Alex.  
FBI Investigates CCA-Run INS Center in New Jersey; 10:10.  
Felony Trial for Planted Knife Is Malicious Prosecution; 2:5; *Klein v. Coblentz*, No. 96-1289 (10th Cir. 1998).  
Florida Guards Acquitted in Brutality Case; 7:3; Friedmann, Alex.  
Florida Jail Guard Found Guilty in Prisoner's Death; 10:11.  
Florida Jail Workers Busted in Bribery Investigation; 10:5.  
Georgia Prison Officials Take Taxpayers for a Long Ride; 1:7.  
Grand Jury Reverses Indictment Against Jailers; 5:17.  
Guard Guilty of Penis Stomping; 7:11; *United States v. Walsh*, 27 F.Supp.2d 186 (WD NY 1998).  
Guard Socked for \$37,500 in Vendetta; 2:15.  
Insanity, Brutality and Fatality: Florida's X-Wing Marks the End of the Line; 10:1; Pens, Dan.  
Judge Throws Out Corcoran Sanctions; 6:14; Wisely, Willie.  
Many Florida Prison Guards Are Law Breakers; 12:21.  
*Maximum Security University*, edited by Tom Quinn (Book and Video Review); 12:8; Fischer, Bob; Stanton, Janet; Wright, Paul.  
New Jersey Guard Wins \$3.75 Million Harassment Suit; 11:5; *Lockley v. New Jersey*, Burlington County, Case No. L03195-94.  
New York Paroles for Sale; 5:20; Lutsky, Julia.  
New York Prison Guard Nailed with DNA Evidence; 2:8.  
No Interlocutory Appeal on Supervisory Liability When Guard Stabs Prisoner; 7:16; *Smith v. Brenoettsy*, 158 F.3d 908 (5th Cir. 1998).  
Pelican Bay Guard Indicted in Shooting; 12:13; Wisely, Willie.  
PLN Sues Washington DOC over Censorship of Nazi Guard Expose; 11:7; *Prison Legal News v. Washington DOC*, USDC ED WA, CS-99-0231-WFN.  
"Tough" Florida Sheriff Arrested; 3:16.  
Tough on Prisoners Florida Sheriff Avoids Prison; 10:11.  
VitaPro President Arrested; 7:14.  
West Virginia DOC Commissioner Resigns After Beating Wife; 9:13.

## Habeas Corpus

AEDPA Statute of Limitations Tolled; 1:12; *Miller v. New Jersey State DOC*, 145 F.3d 616 (3rd Cir. 1998).  
BOP Erred in Denying Early Release Eligibility; 8:20; *Byrd v. Crabtree*, 22 F.Supp.2d 1128 (D Or 1998); *Gavis v. Crabtree*, 28 F.Supp.2d 1264 (D Or 1998); *Hicks v. Brooks*, 28 F.Supp.2d 1268 (D Colo 1998); *Bowen v. Crabtree*, 22 F.Supp.2d 1131 (D Or 1998).  
BOP Erred in Running State Sentence Consecutive to Federal Sentence; 7:18; *Cozine v. Crabtree*, 15 F.Supp.2d 997 (D Or 1998).  
BOP Violates Due Process in Ad-Seg, Transfer and Mail Suit; 11:24; *Rizvi v. Crabtree*, 42 F.Supp.2d 1024 (D OR 1999).  
BOP Violent Offender Notification Policy Overinclusive; 4:25; *Royce v. Hahn*, 151 F.3d 116 (3rd cir. 1998).  
*California Habeas Handbook: A Practical Guide to Habeas Law for California Prisoners* (Review); 5:9.  
De Facto Ban on Live Testimony Unconstitutional; 4:14; *Whitlock v. Johnson*, 153 F.3d 380 (7th Cir. 1998).  
Federal Habeas Not Subject to PLRA; 7:10; *Davis v. Fechtel*, 150 F.3d 486 (5th Cir. 1998).  
Feds Not Obligated to Accept State-Ordered Concurrent Sentence; 10:22; *Young, Ronald*; *Jake v. Herschberger*, 173 F.3d 1059 (7th Cir. 1999).  
Liberty Interest in Erroneous Parole Release; 9:22; *Young, Ronald*; *Hawkins v. Freeman*, 166 F.3d 267 (4th Cir. 1999).  
Parole Change May Violate Ex Post Facto; Change Can Be Challenged Via § 1983; 4:24; *Blair-Bey v. Quick*, 151 F.3d 1036 (DC Cir. 1998); *Anyanwutaku v. Moore*, 151 F.3d 1053 (DC Cir.

1998); *Blair-Bey v. Quick*, 159 F.3d 591 (DC Cir. 1998).  
 Pennsylvania Supreme Court Draws the Line on Jailhouse Snitches;  
 3:15; *Commonwealth of Pennsylvania v. Franciscus*, 710 A.2d  
 1112 (Penn. 1998).  
 Released Sex Offender Not "In Custody" for Habeas; 4:22;  
*Williamson v. Gregoire*, 151 F.3d 1180 (9th Cir. 1998).  
 Twenty-Four Hour Notice of Disciplinary Charges Required; 4:25;  
*Evans v. Deuth*, 8 F.Supp.2d 1135 (ND IN 1998).

## HIV/AIDS

Book Review: *Breaking the Walls of Silence*; 2:4; Whitehorn, Laura.  
 Denial of HIV Medication Subjects Medical Contractor to Liability;  
 7:17; *McNally v. Prison Health Services, Inc.*, 28 F.Supp.2d 671  
 (D ME 1998).  
 PLRA Dismissals for Failure to Plead Physical Injury Reviewed De  
 Novo; 9:27; *Perkins v. Kansas Dept. of Corrections*, 165 F.3d  
 803 (10th Cir. 1999).  
 PLRA Physical Injury Requirement Constitutional; 9:16; Quigley,  
 James; *Davis v. District of Columbia*, 158 F.3d 1342 (DC Cir.  
 1998).  
 Trial Required in ADA Suit over HIV Medication; 12:19; *McNally*  
*v. Prison Health Services*, 52 F.Supp.2d 147 (D ME 1999);  
*McNally v. Prison Health Services*, 46 F.Supp.2d 49 (D ME  
 1999).  
 Warden May Be Liable for Rape; 3:22; *Spruce v. Sargent*, 149 F.3d  
 783 (8th Cir. 1998).

## Immigration

BOP Sentence Reduction Exclusion Based on INS Detainer Upheld;  
 10:25; Young, Ronald; *McLean v. Crabtree*, 173 F.3d 1176 (9th  
 Cir. 1999).  
 FBI Investigates CCA-Run INS Center in New Jersey; 10:10.

## Immunity

\$7,000 Award to Prisoner Shoved by Guard while Praying; 11:8;  
*Arroyo Lopez v. Nutall*, 25 F.Supp.2d 409 (SD NY 1998).  
 Denial of Good Time Because of Jury Sentencing Choice Violates  
 Equal Protection; 4:21; *Stefanoff v. Hays County, Tex.*, 154 F.3d  
 523 (5th Cir. 1998).  
 Denial of Pain Medication Violates Eighth Amendment; 8:20;  
*Ralston v. McGovern*, 167 F.3d 1160 (7th Cir. 1999).  
 Eighth Amendment Applies to Escaped Convicts; 3:17; *Gravely v.*  
*Madden*, 142 F.3d 345 (6th Cir. 1998).  
 Frivolous Qualified Immunity Appeals Warrant Sanctions; 8:16;  
*Berryman v. Rieger*, 150 F.3d 561 (6th Cir. 1998).  
 Illinois Sheriffs Are County Employees; 2:15; *Franklin v. Zaruba*,  
 150 F.3d 682 (7th Cir. 1998).  
 Indiana Jail Ban on Publications Struck Down; 2:23; *Moss v.*  
*Speybroeck*, USDC, ND IN, Southbend Division, 3:97-CV-  
 378RM.  
 Individual Capacity Claims Not Applicable to RA and ADA; 8:16;  
*Montez v. Romer*, 32 F.Supp.2d 1235 (D Colo. 1999).  
 Media Interview Protected Free Speech; 10:11; *Castle v. Clymer*, 15  
 F.Supp.2d 640 (ED PA 1998).  
 New York Prisoners Have Right to Staff Assistance and Witness  
 Testimony; 4:16; *Ayers v. Ryan*, 152 F.3d 77 (2nd Cir. 1998).  
 No Admin. Exhaustion Required for Monetary Claims; No Qual.  
 Immunity for Malicious Use of Force; 3:12; *Jackson v. DeTella*,  
 998 F.Supp. 901 (ND IL 1998).  
 No Admin. Exhaustion Required for Monetary Claims; No Qual.  
 Immunity for Malicious Use of Force; 3:12; *Holliman v. DeTella*,  
 6 F.Supp. 2d 968 (ND IL 1998).  
 No Court Access Right to Litigate Civil Forfeiture; 9:21; *Wilson v.*  
*Blankenship*, 163 F.3d 1284 (11th Cir. 1998).  
 No Immunity for Forcing Disabled Prisoner to Work; 1:9; *Sanchez*

*v. Taggart*, 144 F.3d 1154 (8th Cir. 1998).  
 No Interlocutory Appeal on Supervisory Liability When Guard  
 Stabs Prisoner; 7:16; *Smith v. Brenoetsy*, 158 F.3d 908 (5th Cir.  
 1998).  
 No Private Rights Under International Treaties; 3:5; *White v.*  
*Paulsen*, 997 F.Supp. 1380 (ED WA 1998).  
 No Qualified Immunity for Texas Sheriff and CCRI Guards Who  
 Abused Missouri Prisoners; 8:18; Clarke, Matthew T.; *Kesler v.*  
*King*, 29 F.Supp.2d 356 (SD Tex. 1998).  
 Parole Officer Recommendation Not Protected by Absolute  
 Immunity; 2:20; *Scotto v. Almenas*, 143 F. 3d 105 (2nd Cir.1998).  
 Perp Walks Unconstitutional According to New York Federal Court;  
 10:25; *Lauro v. City of New York*, 39 F.Supp.2d 351 (SD NY  
 1999).  
 Private Prison Guard Is State Actor for § 1983 Purposes; 7:14;  
*Giron v. CCA*, 14 F.Supp.2d 1245 (D NM 1998).  
 Private Transportation Company Liable Under 42 USC § 1983;  
 10:15; *Gwynn v. TransCor America, Inc.*, 26 F.Supp.2d 1256 (D  
 Colo. 1998).  
 Probable Cause Hearing Delay Actionable; 11:10; Young, Ronald;  
*Luck v. Rovenstine*, 168 F.3d 323 (7th Cir. 1999).  
 Qualified Immunity in Transsexual Treatment Case; 7:21; *Farmer v.*  
*Moritsugu*, 163 F.3d 610 (DC Cir. 1998).  
 Sandin Does Not Apply to Pretrial Detainees; 12:22; *Rapier v.*  
*Harris*, 172 F.3d 999 (7th Cir. 1999).  
 US Supreme Court Holds Media Ride-Alongs Unconstitutional;  
 9:15; *Wilson v. Layne*, 119 S.Ct. 1692 (1999) *Hanlon v. Berger*,  
 119 S.Ct. 1706 (1999).  
 Warden May Be Liable for Rape; 3:22; *Spruce v. Sargent*, 149 F.3d  
 783 (8th Cir. 1998).

## International Law

No Private Rights Under International Treaties; 3:5; *White v.*  
*Paulsen*, 997 F.Supp. 1380 (ED WA 1998).  
 Stun Belts in Court Unconstitutional; 9:24; *Hawkins v. Comparet-*  
*Cassani*, 33 F.Supp.2d 1244 (CD CA 1999).

## Jail Conditions

\$100,000 Settlement in South Carolina Jail Death; 11:17.  
 \$90,000 Settlement in Utah Jail Suicide; 10:14; *Estate of Henry*  
*Delgado v. Salt Lake County*, USDC D UT, 2:99-CV-39-B.  
 Abuse of Discretion to Dismiss Medical Suit; 2:18; *Hudson v.*  
*McHugh*, 148 F.3d 859 (7th Cir. 1998).  
 Alabama Jail Injunction Dissolved; 8:29; *Parrish v. Alabama DOC*,  
 156 F.3d 1128 (11th Cir. 1998).  
 Alabama Prison Officials Held in Contempt Again; 10:23; *Chairs v.*  
*Burgess*, 25 F.Supp.2d 1333 (ND Ala. 1998).  
 Arizona Jail Porn Ban Struck Down; 2:25; *Mauro v. Arpaio*, 147  
 F.3d 1137 (9th Cir. 1998).  
 Arizona Jail Slave Labor Used to Stuff Ballot Envelopes; 1:7.  
 Arkansas Sheriff Bent on "Saving" Prisoners; 3:16.  
 Beaten Connecticut Jail Detainee Awarded \$2.07 Million; 9:10.  
 Colorado Contraband Rule Requires Visitor Notice; 2:23; *People v.*  
*Holmes*, 959 P.2d 406 (Colo. 1998).  
 Concealment of Info Tolls Statute of Limitations; 10:19; *Blaskiewicz*  
*v. County of Suffolk*, 29 F.Supp.2d 134 (ED NY 1998).  
 County Bankruptcy Tolls FRCP 4(m); 5:25; *De Tie v. Orange*  
*County*, 152 F.3d 1109 (9th Cir. 1998).  
 County Jail Political Shenanigans, Corruption Revealed; 9:7; *Knight*  
*v. Vernon*, 23 F.Supp.2d 634 (MD NC 1998).  
 Denial of Good Time Because of Jury Sentencing Choice Violates  
 Equal Protection; 4:21; *Stefanoff v. Hays County, Tex.*, 154 F.3d  
 523 (5th Cir. 1998).  
 Denial of Handicapped Jail Facilities Set for Trial; 4:27; *Frost v.*  
*Agros*, 152 F.3d 1124 (9th Cir. 1998).

Denial of HIV Medication Subjects Medical Contractor to Liability; 7:17; *McNally v. Prison Health Services, Inc.*, 28 F.Supp.2d 671 (D ME 1998).

Detainee Beaten to Death at Nassau County Jail; 7:9; Friedmann, Alex.

Florida Jail Guard Found Guilty in Prisoner's Death; 10:11.

Florida Jail Workers Busted in Bribery Investigation; 10:5.

Former Jail Prisoner Awarded \$8,000 for Abuse; PLRA Attorney Fee Limit Inapplicable to Juveniles; 4:5; *Doe by and through Doe v. Washington County*, 150 F.3d 920 (8th Cir. 1998).

Grand Jury Reverses Indictment Against Jailers; 5:17.

Guard Guilty of Penis Stomping; 7:11; *United States v. Walsh*, 27 F.Supp.2d 186 (WD NY 1998).

Illegal Detention Violates Substantive Due Process; 4:15; *Armstrong v. Squadrito*, 152 F.3d 564 (7th Cir. 1998).

Illinois Sheriffs Are County Employees; 2:15; *Franklin v. Zaruba*, 150 F.3d 682 (7th Cir. 1998).

Indiana Jail Ban on Publications Struck Down; 2:23; *Moss v. Speybroeck*, USDC, ND IN, Southbend Division, 3:97-CV-378RM.

Jail Brutality Verdict Reversed Due to Improper Argument and Jury Instruction; 3:23; *Spicer v. Rossetti*, 150 F.3d 642 (7th Cir. 1998).

Kentucky Jail Settles Strip Search Suit for \$11.5 Million; 8:7.

Mitigation Instruction and Excluding Indemnification Evidence Reversible Error; 6:16; *Lawson v. Trowbridge*, 153 F.3d 368 (7th Cir. 1998).

Motive Question Precludes Summary Judgment in Medical Suit; 8:21; *Davis v. Dorsey*, 167 F.3d 411 (8th Cir. 1999).

New Jersey Jail Settles Chemical Burn Suit for \$900,000; 12:16; *Zamot v. County of Atlantic County*, USDC D NJ, Camden Vicinage, 97-CV-4220.

New York City Arrestee Awarded \$5.02 Million in Strip Search; 11:6.

New York Jail Brutality Suit Settled for \$3,500; 4:23; *Massey v. City of New York, et al.*, USDC SD NY, 97CIV-7607(LAP).

No Qualified Immunity for Texas Sheriff and CCRI Guards Who Abused Missouri Prisoners; 8:18; Clarke, Matthew T.; *Kesler v. King*, 29 F.Supp.2d 356 (SD Tex. 1998).

PLN Sues Utah Jail Over Publication Ban; Suit Settled; 3:8; *Catalyst, et al v. Box Elder County, Utah, et al*, USDC D UT, 1-98CV-00130K.

PLRA Attorney Fee Provision Not Retroactive in Jail Conditions Suit; 11:28; *Inmates of DC Jail v. Johnson*, 158 F.3d 1357 (DC Cir. 1998).

Prisoners Entitled to Money Damages and Injunctive Relief under ADA and RA; 2:22; *Key v. Grayson*, 998 F.Supp. 793 (E.D. Mich. 1998).

Probable Cause Hearing Delay Actionable; 11:10; Young, Ronald; *Luck v. Rovenstine*, 168 F.3d 323 (7th Cir. 1999).

Retaliation Suit States Claim; 7:24; *Lewis v. Cook Co. Dept. of Corrections*, 28 F.Supp.2d 1073 (ND IL 1998).

Rikers Island Brutality Suit Settled; 2:16; Chasan, Jonathan; *Sheppard v. Phoenix*, USDC SD NY 91-civ-4148 (RPP).

Rikers Island Detainee Shot; 9:12.

Sandin Does Not Apply to Pretrial Detainees; 12:22; *Rapier v. Harris*, 172 F.3d 999 (7th Cir. 1999).

Sheriff Liable for Inadequate Staffing and Refusing Medical Treatment to Assaulted Prisoner; 11:20; *Lopez v. LeMaster*, 172 F.3d 756 (10th Cir. 1999).

Tarrant County Jail's Christian Education Unit May Violate Texas and Federal Establishment Clauses; 8:21; *Lara v. Williams*, 986 SW2d 310 (Tex.App.-Fort Worth 1999).

Texas Jail Whistleblower Awarded \$3.3 Million; 9:14.

"Tough" Florida Sheriff Arrested; 3:16.

Transsexual Awarded \$755,000 in Jail Strip Search; 9:15.

Trial Required in ADA Suit over HIV Medication; 12:19; *McNally v. Prison Health Services*, 52 F.Supp.2d 147 (D ME 1999); *McNally v. Prison Health Services*, 46 F.Supp.2d 49 (D ME 1999).

Trial Required in Jail Attack; 11:25; *Baker v. Willett*, 42 F.Supp.2d 192 (ND NY 1999).

Utah Jail Censorship Suit Settled for \$68,682; 5:6; *Ayala v. Davis Co. Utah*, USDC D UT, 1-96-CV-00030C.

Utah Jail Settles ADA Suit; 10:14; *Earls v. Salt Lake County*, USDC D UT, 2-98-CV-521J.

Victim of Guard Rape Awarded \$50,000; 2:17; *Ware v. Jackson County, Mo.*, 150 F.3d 873 (8th Cir. 1998).

## Juries

Consenting to Have Magistrate Conduct Trial Not Waiver to Right to Jury Trial; 5:25; *Jennings v. McCormick*, 154 F.3d 542 (5th Cir. 1998).

Denial of Handicapped Jail Facilities Set for Trial; 4:27; *Frost v. Agros*, 152 F.3d 1124 (9th Cir. 1998).

Mitigation Instruction and Excluding Indemnification Evidence Reversible Error; 6:16; *Lawson v. Trowbridge*, 153 F.3d 368 (7th Cir. 1998).

## Juveniles

CSC Cancels Florida Juvenile Facility Contract; 12:11.

Former Jail Prisoner Awarded \$8,000 for Abuse; PLRA Attorney Fee Limit Inapplicable to Juveniles; 4:5; *Doe by and through Doe v. Washington County*, 150 F.3d 920 (8th Cir. 1998).

Juvenile Crime Still Pays — But at What Cost?; 1:1; Friedmann, Alex.

Juveniles Held Hostage for Profit by CSC in Florida; 6:15; Friedmann, Alex.

Stanford University Tests Drugs on Imprisoned Juveniles; 12:11.

Texas Settles with Hanged Prisoner's Family; 10:19.

Virginia Juvenile Dies of Accidental Heart Attack; 12:12; Pens, Dan.

## Mail Regulations

AHCC Bulk Mail Ban in *Miniken* Settled; 3:17; *Miniken v. Walter*, 9th Cir. Case No. 97-35913, 97-36072.

Arizona Jail Porn Ban Struck Down; 2:25; *Mauro v. Arpaio*, 147 F.3d 1137 (9th Cir. 1998).

BOP Violates Due Process in Ad-Seg, Transfer and Mail Suit; 11:24; *Rizvi v. Crabtree*, 42 F.Supp.2d 1024 (D OR 1999).

DC Circuit Lifts Injunction on BOP Porn Ban; 9:17; *Amatel v. Reno*, 156 F.3d 192 (DC Cir. 1998).

Florida Porn Ban Challenged; 6:15; *Komar Company v. Singletary*, USDC SD FL, 98-14294-CIV-Davis.

Indiana Jail Ban on Publications Struck Down; 2:23; *Moss v. Speybroeck*, USDC, ND IN, Southbend Division, 3:97-CV-378RM.

Iowa Ban on Tapes with Parental Warning Upheld; 8:22; Wright, Paul; *Herlein v. Higgins*, 172 F.3d 1089 (8th Cir. 1999).

Mauro Vacated for Rehearing; 4:24; *Mauro v. Arpaio*, 162 F.3d 547 (9th Cir. 1998).

Missouri Ends Ad Seg Ban on Publications; 7:8; *White-Bey v. Missouri DOC*, 24th Judicial Circuit, Wash. Co., CV-1098-435cc.

New Jersey Porn Ban Struck Down; 5:21; *Waterman v. Verniero*, 12 F.Supp.2d 378 (D NJ 1998)(permanent injunction); *Waterman v. Verniero*, 12 F.Supp.2d 364 (D NJ 1998)(preliminary injunction).

Pennsylvania Ban on Writing by Mumia Abu-Jamal Enjoined; 5:5; *Abu-Jamal v. Price*, 154 F.3d 128 (3rd Cir. 1998).

PLN Sues Alabama DOC Over Gift Subscription Ban; 8:5; *Prison Legal News v. Haley*, USDC MD AL, CV-99-S-486-N.

PLN Sues Michigan DOC over Censorship of *The Celling of America*; 4:4; *Prison Legal News v. Ransom*, USDC ED MI, CV-99-70523AC.

PLN Sues Oregon DOC Over Bulk Mail Ban; 1:6; *Prison Legal News v. Cook*, USDC Oregon, 98-1344MA.

PLN Sues Utah Jail over "Bulk Mail" Ban; 8:15; *Prisoners' Legal News v. Christensen*, USDC D UT, 2:99-CV-0149G.

PLN Sues Utah Jail Over Publication Ban; Suit Settled; 3:8; *Catalyst, et al v. Box Elder County, Utah, et al*, USDC D UT, 1-98CV-00130K.

PLN Sues Washington DOC over Censorship of Nazi Guard Expose; 11:7; *Prison Legal News v. Washington DOC*, USDC ED WA, CS-99-0231-WFN.

PLN Writer Settles Nude Photo Suit for \$3,000; 2:14; *Quigley v. Atmore, et al*, USDC 95-1138-Civ-T-24E (M.D.Fla.).

Utah Jail Censorship Suit Settled for \$68,682; 5:6; *Ayala v. Davis Co. Utah*, USDC D UT, 1-96-CV-00030C.

Washington Gift Subscription Ban Injunction Affirmed; 7:13.

## Medical Treatment

\$1,500 in Disabled Prisoner Work Suit; 4:23; *Williams v. Norris*, 148 F.3d 983 (8th Cir. 1998).

\$355,000 Verdict in New York Asthma Death; 4:23.

\$4,000 Awarded to Paraplegic Prisoners Segregated Under Improper Conditions; 5:24; *Simmons v. Cook*, 154 F.3d 805 (8th Cir. 1998).

\$45,000 Award in BOP Tort Claim Medical Neglect Suit; 4:22; *Muhammed v. U.S.*; 6 F.Supp.2d 582 (ND Tex. 1998).

A Foul Trend Emerges; 9:4; Herivel, Tara.

Abuse of Discretion to Dismiss Medical Suit; 2:18; *Hudson v. McHugh*, 148 F.3d 859 (7th Cir. 1998).

*Acres of Skin: Human Experiments at Holmesburg Prison* by Allen M. Hornblum (Book Review); 3:6; Burton-Rose, Daniel.

Cane Seizure Can Violate Eighth Amendment; 4:29; *Rosales v. Coughlin*, 10 F.Supp.2d 261 (WD NY 1998).

Cheaper Than Lab Rats: Can Prisoners Glow in the Dark?; 3:1; Sherrer, Hans.

CMS Settles Wrongful Death Suit for \$75,000; 6:13; *Murphy v. CMS*, New Castle Co. Superior Court, DE, 95C-07-148SCD.

Corcoran Prisoner Left Hanging; 6:7.

Denial of Handicapped Jail Facilities Set for Trial; 4:27; *Frost v. Agros*, 152 F.3d 1124 (9th Cir. 1998).

Denial of HIV Medication Subjects Medical Contractor to Liability; 7:17; *McNally v. Prison Health Services, Inc.*, 28 F.Supp.2d 671 (D ME 1998).

Denial of Pain Medication Violates Eighth Amendment; 8:20; *Ralston v. McGovern*, 167 F.3d 1160 (7th Cir. 1999).

Ex-Prisoner Gets \$850,000 for Broken Neck; 9:7.

Failing to Provide Disabled Prisoner Showers for Two Months Cruel and Unusual; 6:13; *Bradley v. Puckett*, 157 F.3d 1022 (5th Cir. 1998).

Federal Judge Rules Texas Prisons Still Unconstitutional, PLRA Unconstitutional; 6:1; Clarke, Matthew T.; *Ruiz v. Johnson*, 37 F.Supp.2d 855 (SD TX 1999).

Fifth Circuit Says Rotting to Death in Prison Okay; 12:20; Young, Ronald; *Stewart v. Murphy*, 174 F.3d 530 (5th Cir. 1999).

Florida Nicotine Addiction Suit Settled; 3:15; *Waugh v. Singletary*, USDC MD FL (Jacksonville), 95-605-CIV-J-20A.

*Franklin* Reversed; DC Prisoners Have No Right to Qualified Interpreters; 8:17; *Franklin v. District of Columbia, rehearing denied*, 168 F.3d 1360 (DC Cir. 1999); *Franklin v. District of Columbia*, 163 F.3d 625 (DC Cir. 1999).

Frivolous Qualified Immunity Appeals Warrant Sanctions; 8:16; *Berryman v. Rieger*, 150 F.3d 561 (6th Cir. 1998).

Is Health Care Too Much to Ask For?; 9:5; Talvi, Silja J.A.; *Shumate v. Wilson*, No Cite.

Juvenile Crime Still Pays — But at What Cost?; 1:1; Friedmann, Alex.

Medical Care Unconstitutional in Puerto Rico Prisons; 4:3; *Morales Feliciano v. Rossello Gonzalez*, 13 F.Supp.2d 151 (D. Puerto Rico 1998).

Mitigation Instruction and Excluding Indemnification Evidence Reversible Error; 6:16; *Lawson v. Trowbridge*, 153 F.3d 368 (7th Cir. 1998).

Motive Question Precludes Summary Judgment in Medical Suit; 8:21; *Davis v. Dorsey*, 167 F.3d 411 (8th Cir. 1999).

No Private Rights Under International Treaties; 3:5; *White v. Paulsen*, 997 F.Supp. 1380 (ED WA 1998).

PLRA Dismissals for Failure to Plead Physical Injury Reviewed De Novo; 9:27; *Perkins v. Kansas Dept. of Corrections*, 165 F.3d 803 (10th Cir. 1999).

*Prison Madness*, by Terry Kupers, MD (Book Review); 6:4; Pens, Dan.

Prisoner Suing Prison Physician for Deliberate Indifference; 9:23; *Hudak v. Miller*, 28 F.Supp.2d 827 (SD NY 1998).

Prisoners Entitled to Money Damages and Injunctive Relief under ADA and RA; 2:22; *Key v. Grayson*, 998 F.Supp. 793 (E.D. Mich. 1998).

Private Prison Operators Enter Medical Care Market; 8:12; Friedmann, Alex.

Pro Se Pennsylvania Prisoner Awarded \$100,000 in Guard Attack; 9:13; *Henderson v. Mazurkiewicz*, USDC MD PA, 4:CV-97-250.

Qualified Immunity in Transsexual Treatment Case; 7:21; *Farmer v. Moritsugu*, 163 F.3d 610 (DC Cir. 1998).

Settlement in Deaf Washington State Prisoners' Lawsuit; 2:12; Crollard, Jeff; *Duffy v. Riveland*, Case No. C92-1596R & C93-637R (W.D. Wash.).

Sheriff Liable for Inadequate Staffing and Refusing Medical Treatment to Assaulted Prisoner; 11:20; *Lopez v. LeMaster*, 172 F.3d 756 (10th Cir. 1999).

Stanford University Tests Drugs on Imprisoned Juveniles; 12:11.

Suicides at Connecticut Prison Raise Concerns about Mental Health Care; 11:14.

Tainted Plasma Traced to Arkansas Prison: Bill Clinton's Blood Trails; 5:1; St. Clair, Jeffrey.

Texas Settles with Hanged Prisoner's Family; 10:19.

The Mental Torture of American Prisoners: Cheaper Than Lab Rats, Part 2; 4:1; Sherrer, Hans.

*The Mentally Disordered Inmate and the Law*, by Fred Cohen (Book Review); 7:4; Wright, Paul.

Trial Required in ADA Suit over HIV Medication; 12:19; *McNally v. Prison Health Services*, 52 F.Supp.2d 147 (D ME 1999).

Trial Required in ADA Suit over HIV Medication; 12:19; *McNally v. Prison Health Services*, 46 F.Supp.2d 49 (D ME 1999).

Utah Jail Settles ADA Suit; 10:14; *Earls v. Salt Lake County*, USDC D UT, 2-98-CV-521J.

Withholding Dental Care Violates Eighth Amendment; 7:15; Young, Ronald; *Ramos v. O'Connell*, 28 F.Supp.2d 796 (WD NY 1998).

Wreaking Medical Mayhem in Washington Prisons; 9:1; Herivel, Tara; *Hallett v. Payne*, USDC WD WA, Case No.93-5496.

## News

\$355,000 Verdict in New York Asthma Death; 4:23.

\$660,000 Awarded in Post-Sandin Segregation Suit; 7:14.

Abuse of Prisoners Confirmed at CCA Facility; 2:18.

Arizona Jail Slave Labor Used to Stuff Ballot Envelopes; 1:7.

Arkansas Sheriff Bent on "Saving" Prisoners; 3:16.

Beaten Attica Prisoner Awarded \$70,000; 12:5.

Beaten Connecticut Jail Detainee Awarded \$2.07 Million; 9:10.

California Changes Shooting Policy; 11:8; Wisely, Willie.

California Guard Union Doles Out Millions to Politicians; 8:23.

California Guards Indicted in Rapes; 2:8; Wisely, Willie.  
California Illegally Dumps Parole Records; 11:14; Wisely, Willie.  
California Prison Legal Fund Broke; 11:12; Wisely, Willie.  
Cancellation of TDCJ/VitaPro Contract Reversed; 2:21; *VitaPro Foods v. Department of Criminal Justice*, 969 SW 2d 84 (Tex.App.-Texarkana 1998).  
CCA Prison Realty Merger Approved; 6:11; Friedmann, Alex.  
CCPOA Pimping in the California State Assembly; 11:9; Pens, Dan.  
CDC Settles Corcoran Shooting Suit for \$2.2 Million; 12:9.  
CDC Whistleblower Gets \$1.7 Million; 10:23.  
Cheaper Than Lab Rats: Can Prisoners Glow in the Dark?; 3:1; Sherrer, Hans.  
Colorado Prisoner Acquitted of Kidnapping; 5:19.  
Colorado Prisoner Beaten, Not Stabbed; 3:14.  
Construction Audit Criticizes Oregon DOC; 12:18.  
Corcoran Bad Apple Rehired; 11:13; Wisely, Willie.  
Corcoran Prisoner Left Hanging; 6:7.  
Corcoran Shooting Death Suit Settled for \$825,000; 5:18; *Estate of Preston Tate v. Gomez*, USDC ED CA, CV-F-95-5239-DLB.  
Daring Death Row Escape Shakes up Texas; 4:13.  
Death Row Eulogy; 10:3; Van Poyck, William.  
Detainee Beaten to Death at Nassau County Jail; 7:9; Friedmann, Alex.  
Ex-Prisoner Gets \$850,000 for Broken Neck; 9:7.  
Ex-Welfare Workers in Georgia Replaced with Prison Slaves; 11:11.  
Federal Judge Rules Texas Prisons Still Unconstitutional, PLRA Unconstitutional; 6:1; Clarke, Matthew T.; *Ruiz v. Johnson*, 37 F.Supp.2d 855 (SD TX 1999).  
Florida Guards Acquitted in Brutality Case; 7:3; Friedmann, Alex.  
Florida Jail Guard Found Guilty in Prisoner's Death; 10:11.  
Florida Jail Workers Busted in Bribery Investigation; 10:5.  
Florida Prison Erupts; 7:12.  
Former Guinea Pigs Protest; 3:3.  
Georgia Prison Officials Take Taxpayers for a Long Ride; 1:7.  
Go Directly to Jail: At the Academy in Alpharetta, Men Pay Big Bucks to Pretend They're in Prison; 10:16; Savage, Dan.  
Grand Jury Reverses Indictment Against Jailers; 5:17.  
Guard Guilty of Penis Stomping; 7:11; *United States v. Walsh*, 27 F.Supp.2d 186 (WD NY 1998).  
Guard Raped, Entire Texas Prison System Locked Down; 5:17.  
Human Feces in California Prison's Water; 7:6; Wisely, Willie.  
Illinois KKK Guard Loses Lawsuits, Goes to Prison; 5:7; Wright, Paul; *Weicherding v. Riegel*, 160 F.3d 1139 (7th Cir. 1998).  
Illinois Prison Home to Illegal Tire Dump; 12:25.  
Insanity, Brutality and Fatality: Florida's X-Wing Marks the End of the Line; 10:1; Pens, Dan.  
Iowa to Close Prison Law Libraries; 7:7.  
Is Health Care Too Much to Ask For?; 9:5; Talvi, Silja J.A.; *Shumate v. Wilson*, No Cite.  
Judge Throws Out Corcoran Sanctions; 6:14; Wisely, Willie.  
Jury Awards \$2.3 Million for Slain San Quentin Prisoner, State Settles for \$2.5 Million; 5:3; Wisely, Willie.  
Jury Awards \$8,000 in California Prison Assault; 4:16; *Garcia v. Pozzi*, USDC ED CA, CIV-S-95-0009-DADP.  
Jury Awards Beaten Texas Prisoner \$250,000; 8:13; *Sikes v. Gaytan*, USDC \_\_\_\_ TX Court no. 95-CA-1.300PMA.  
Many Florida Prison Guards Are Law Breakers; 12:21.  
Michigan Department of Corrections Fined \$300,000 in Contempt Case; 4:5; *Glover v. Johnson*, 9 F.Supp.2d 799 (ED MI 1998).  
Nevada Guards Party with Inmate Welfare Fund; 11:12.  
New Jersey Guard's Killer Gets Life; 5:19.  
New York Paroles for Sale; 5:20; Lutsky, Julia.  
New York Prison Guard Nailed with DNA Evidence; 2:8.  
Ohio Prisons Cited by EPA; 7:8; Cahill, Dan.  
Open Society Institute Funds College Classes in Maryland Prisons; 1:8.  
Pelican Bay Guard Indicted in Shooting; 12:13; Wisely, Willie.  
PLN Sues Alabama DOC Over Gift Subscription Ban; 8:5; *Prison Legal News v. Haley*, USDC MD AL, CV-99-S-486-N.  
PLN Sues Michigan DOC over Censorship of *The Celling of America*; 4:4; *Prison Legal News v. Ransom*, USDC ED MI, CV-99-70523AC.  
PLN Sues Oregon DOC Over Bulk Mail Ban; 1:6; *Prison Legal News v. Cook*, USDC Oregon, 98-1344MA.  
PLN Sues Utah Jail over "Bulk Mail" Ban; 8:15; *Prisoners' Legal News v. Christensen*, USDC D UT, 2:99-CV-0149G.  
PLN Sues Washington DOC over Censorship of Nazi Guard Expose; 11:7; *Prison Legal News v. Washington DOC*, USDC ED WA, CS-99-0231-WFN.  
Prison Realty Board Member Settles Ethics Complaints; 9:12.  
Prison Realty Stock Plummets; Shareholders File Suit; 11:13.  
Prison-Industrial Complex Conferences Are Spreading the Word; 8:7; Sherrer, Hans.  
Private Prison Escape Explained; 6:6.  
Private Prison Operators Enter Medical Care Market; 8:12; Friedmann, Alex.  
Pro Se Pennsylvania Prisoner Awarded \$100,000 in Guard Attack; 9:13; *Henderson v. Mazurkiewicz*, USDC MD PA, 4:CV-97-250.  
Pro Se Texas Prisoner Awarded \$1.08 Million in Failure to Protect Suit; 10:10.  
Rikers Island Detainee Shot; 9:12.  
Riots Rock CCA Prison in Oklahoma; 12:16.  
Satellite Tracks Parolees; 12:29; Wisely, Willie.  
South Korea Frees Political Prisoner after 41 Years; 7:7.  
Stanford University Tests Drugs on Imprisoned Juveniles; 12:11.  
Strip Mining Human Rights in Virginia's Supermax Dungeons; 7:1; Pens, Dan.  
Suicides Plague Florida Women's Prison; 5:11; Friedmann, Alex.  
Tainted Plasma Traced to Arkansas Prison: Bill Clinton's Blood Trails; 5:1; St. Clair, Jeffrey.  
Tennessee Prison Guard to Pay \$50,000 for Stabbing; 12:13.  
Tennessee Prisoners Fight to Keep Money; 1:6.  
Texas Jail Whistleblower Awarded \$3.3 Million; 9:14.  
The Mental Torture of American Prisoners: Cheaper Than Lab Rats, Part 2; 4:1; Sherrer, Hans.  
Timothy "Little Rock" Reed Released on Parole; 4:23.  
"Tough" Florida Sheriff Arrested; 3:16.  
Tough on Prisoners Florida Sheriff Avoids Prison; 10:11.  
Transsexual Awarded \$755,000 in Jail Strip Search; 9:15.  
University Professor Shills for Private Prison Industry; 2:10; Friedmann, Alex.  
Violence Takes a Toll at New Mexico Wackenhut Prison; 6:12; Young, Ronald.  
Virginia Juvenile Dies of Accidental Heart Attack; 12:12; Pens, Dan.  
Virginia Prison "Fire Trap" Finding Reversed; 2:9.  
VitaPro President Arrested; 7:14.  
Wackenhut's Woes: Guard Killed in New Mexico Riot; Prisoners Exiled to Virginia Supermax; 12:1; Friedmann, Alex.  
Washington Parole Officer Blown Up; 6:3.  
Washington Prisoners Brutalized in Colorado Private Prison; 6:10.  
Washington Prisoners Damage Colorado Private Prison; 6:10.  
West Virginia DOC Commissioner Resigns After Beating Wife; 9:13.  
White Guard, Black Guard: Racism in Washington Continues; 5:12; Vogel, Jennifer.  
Wisconsin Prisoners Stage Food Protest; 7:10.  
Wisconsin Resists Out-of-State Transfers; 3:9.  
Wreaking Medical Mayhem in Washington Prisons; 9:1; Herivel, Tara; *Hallett v. Payne*, Case No. USDC WD WA, 93-5496.

## Overcrowding

Alabama Jail Injunction Dissolved; 8:29; *Parrish v. Alabama DOC*,

156 F.3d 1128 (11th Cir. 1998).  
 Former Jail Prisoner Awarded \$8,000 for Abuse; PLRA Attorney Fee Limit Inapplicable to Juveniles; 4:5; *Doe by and through Doe v. Washington County*, 150 F.3d 920 (8th Cir. 1998).  
 Texas Prison Warehouses (Letter); 9:9; Hoffman, D.G. "Tex".  
 Wisconsin Resists Out-of-State Transfers; 3:9.

## Parole

1999 Washington Legislative Roundup; 12:14.  
 California Governor Vetoes Parole Reform Bill; 11:14.  
 California Illegally Dumps Parole Records; 11:14; Wisely, Willie.  
 California Parolee Gag Order Lifted; 1:3.  
 Federal Parolee Has Right to Hearing Under 18 USC § 4211(a)(2); 9:25; *Valona v. US Parole Com'n*, 165 F.3d 508 (7th Cir. 1998).  
*Franklin* Reversed; DC Prisoners Have No Right to Qualified Interpreters; 8:17; *Franklin v. District of Columbia*, 163 F.3d 625 (DC Cir. 1999); *Franklin v. District of Columbia*, rehearing denied, 168 F.3d 1360 (DC Cir. 1999).  
 Georgia Parole Regulation Still Ex Post Facto; 10:21; *Jones v. Garner*, 164 F.3d 589 (11th Cir. 1999).  
 Liberty Interest in Erroneous Parole Release; 9:22; Young, Ronald; *Hawkins v. Freeman*, 166 F.3d 267 (4th Cir. 1999).  
 Liberty Interest in Parole-Required Custody Classification; 7:15; *Carillo v. DuBois*, 23 F.Supp.2d 103 (D Mass 1998).  
 New York Paroles for Sale; 5:20; Lutsky, Julia.  
 No Credit for Time Served on Wrongful Conviction; 2:19; *United States v. Jeanes*, 150 F.3d 483 (5th Cir. 1998).  
 No Liberty Interest in Illinois Parole Laws; 8:19; *Heidelberg v. Illinois Prisoner Review Board*, 163 F.3d 1025 (7th Cir. 1998).  
 No Suspicion Required for California Parolee Searches; 7:20; *People v. Reyes*, 80 Cal. Rptr. 734, 968 P.2d 445 (Cal. 1998).  
 Parole Change May Violate Ex Post Facto; Change Can Be Challenged Via § 1983; 4:24; *Blair-Bey v. Quick*, 159 F.3d 591 (DC Cir. 1998); *Blair-Bey v. Quick*, 151 F.3d 1036 (DC Cir. 1998); *Anyanwutaku v. Moore*, 151 F.3d 1053 (DC Cir. 1998).  
 Parole Officer Recommendation Not Protected by Absolute Immunity; 2:20; *Scotto v. Almenas*, 143 F.3d 105 (2nd Cir. 1998).  
 Parole Officials Liable for False Information in Parole Violation Arrest Warrant; 6:17; *Friedland v. Fauver*, 6 F.Supp.2d 292 (D NJ 1998).  
 Satellite Tracks Parolees; 12:29; Wisely, Willie.  
 South Carolina Parole Elimination Violates Ex Post Facto; 4:15; *Phillips v. State of South Carolina*, 504 So.2d 111 (South Carolina 1998).  
*Spencer* Applied to Parolee's § 1983 Claim; 2:26; *Zupan v. Brown*, 5 F.Supp.2d 792 (ND CA 1998).  
 Temporary Injunction Issued to Prevent Sex Offender Notification to Employer; 2:26; *Doe v. Fauver*, 3 F.Supp.2d 485 (D.N.J. 1997).  
 US District Courts Have No Authority to Grant or Deny Credit Toward Sentence; 4:21; *United States v. Whaley*, 148 F.3d 305 (2nd Cir. 1998).  
 Washington Parole Officer Blown Up; 6:3.

## Police

*Lockdown America: Police and Prisons in the Age of Crisis*, by Christian Parenti (Review); 12:6; Wright, Paul.  
 Perp Walks Unconstitutional According to New York Federal Court; 10:25; *Lauro v. City of New York*, 39 F.Supp.2d 351 (SD NY 1999).

## Political Prisoners

Notes from the Unrepententary; 8:6; Whitehorn, Laura.  
 Notes from the Unrepententary; 12:10; Evans, Linda.  
 Pennsylvania Ban on Writing by Mumia Abu-Jamal Enjoined; 5:5;

*Abu-Jamal v. Price*, 154 F.3d 128 (3rd Cir. 1998).  
 South Korea Frees Political Prisoner after 41 Years; 7:7.  
 Timothy "Little Rock" Reed Released on Parole; 4:23.

## Prison Industries/Labor

\$1,500 in Disabled Prisoner Work Suit; 4:23; *Williams v. Norris*, 148 F.3d 983 (8th Cir. 1998).  
 Arizona Can't Seize All Prison Labor Back Wages; 12:15; *Ford v. State*, 979 P.2d 10 (Ariz.App.Div.1, 1999).  
 Arizona Jail Slave Labor Used to Stuff Ballot Envelopes; 1:7.  
 Campaign to End Slavery in American Prisons; 2:3.  
 Ex-Welfare Workers in Georgia Replaced with Prison Slaves; 11:11.  
 Georgia Prison Officials Take Taxpayers for a Long Ride; 1:7.  
 Illinois Prison Home to Illegal Tire Dump; 12:25.  
 No Immunity for Forcing Disabled Prisoner to Work; 1:9; *Sanchez v. Taggart*, 144 F.3d 1154 (8th Cir. 1998).  
 Tainted Plasma Traced to Arkansas Prison: Bill Clinton's Blood Trails; 5:1; St. Clair, Jeffrey.  
 Work Release Prisoners Eligible to Vote on Union Representation; 3:23; *Speedrack Products Group, Ltd.*, 325 NLRB 109 (1998).

## Prison Litigation Reform Act

*A Guide to the Prison Litigation Reform Act*, by John Boston (Review); 11:16; Wright, Paul.  
 Administrative Exhaustion Doesn't Include Judicial Remedies; 3:12; *Jenkins v. Morton*, 148 F.3d 257 (3rd Cir. 1998).  
 Administrative Exhaustion Required in all Cases; 9:18; *Beeson v. Fishkill Corr. Facility*, 28 F.Supp.2d 884 (SD NY 1998).  
 Administrative Remedies Exhausted When Response Time Elapses; 12:22; *Powe v. Ennis*, 177 F.3d 393 (5th Cir. 1999).  
 Alabama Jail Injunction Dissolved; 8:29; *Parrish v. Alabama DOC*, 156 F.3d 1128 (11th Cir. 1998).  
 Alabama Prison Officials Held in Contempt Again; 10:23; *Chairs v. Burgess*, 25 F.Supp.2d 1333 (ND Ala. 1998).  
 Attorney Fee Cap Inapplicable to Pre-PLRA Suits; PLRA Automatic Stay Provisions Constitutional; 2:6; *Hadix v. Johnson*, 143 F.3d 246 (6th Cir. 1998); *Hadix v. Johnson*, 144 F.3d 925 (6th Cir. 1998).  
 Automatic Stay Provision Unconstitutional; 9:18; *McClendon v. City of Albuquerque*, 29 F.Supp.2d 1267 (D NM 1996).  
 BOP Warden Held in Contempt for Failure to Forward PLRA Filing Fee; 8:27; *Hall v. Stone*, 170 F.3d 706 (7th Cir. 1999).  
 Contaminated Water Claim Not Barred by PLRA Physical Injury Rule; 8:26; *Robinson v. Page*, 170 F.3d 747 (7th Cir. 1999).  
 Costs Imposed Regardless of Ability to Pay; 8:24; *Talley-Bey v. Knebl*, 168 F.3d 884 (6th Cir. 1999).  
 Court Screening Applied to Paid Suits Too; 6:13; *Martin v. Scott*, 156 F.3d 578 (5th Cir. 1998).  
 De Novo Review for § 1915A Dismissals; 9:18; *Ruiz v. United States*, 160 F.3d 273 (5th Cir. 1998).  
 Dismissal of Haircut Suits Reversed; 12:25; *Williams v. Norris*, 176 F.3d 1089 (8th Cir. 1999); *Cofer v. Schriro*, 176 F.3d 1082 (8th Cir. 1999).  
 Dismissal with Prejudice for Failure to Exhaust; Prison Must Process Grievance within Time Limits; 2:7; *Underwood v. Wilson*, 151 F.3d 292 (5th Cir. 1998).  
 Eighth Circuit Upholds, Defines IFP Provisions; 4:8; *Lefkovowitz v. Citi-Equity Group Inc.*, 146 F.3d 609 (8th Cir. 1998).  
 Eighth Circuit Upholds, Defines IFP Provisions; 4:8; *Murray v. Dosal*, 150 F.3d 814 (8th Cir. 1998).  
 Eleventh Circuit Upholds Constitutionality of PLRA's Automatic Termination Provision; 12:18; *Nichols v. Hopper*, 173 F.3d 820 (11th Cir. 1999).

En Banc Review Granted in *Taylor*; 1:5; *Taylor v. United States*, 162 F.3d 547 (9th Cir. 1998).

Evidentiary Hearing Allowed in PLRA Consent Decree Terminations; 11:22; *Cagle v. Hutto*, 177 F.3d 253 (4th Cir. 1999).

Exhaustion Not Required for *Bivens* Claim; 6:19; *Whitley v. Hunt*, 158 F.3d 882 (5th Cir. 1998).

Exhaustion Required; 7:10; *Giano v. Goord*, 9 F.Supp.2d 235 (WD NY 1998).

Federal Habeas Not Subject to PLRA; 7:10; *Davis v. Fechtel*, 150 F.3d 486 (5th Cir. 1998).

Federal Judge Rules Texas Prisons Still Unconstitutional, PLRA Unconstitutional; 6:1; Clarke, Matthew T.; *Ruiz v. Johnson*, 37 F.Supp.2d 855 (SD TX 1999).

Federal Prisoners Must Exhaust Administrative Remedies Before Suing; 6:18; *Alexander v. Hawk*, 159 F.3d 1323 (11th Cir. 1998).

Fifth Circuit Upholds PLRA Exhaustion Requirement; 6:18; Young, Ronald; *Wendell v. Asher*, 162 F.3d 887 (5th Cir. 1998).

Former Jail Prisoner Awarded \$8,000 for Abuse; PLRA Attorney Fee Limit Inapplicable to Juveniles; 4:5; *Doe by and through Doe v. Washington County*, 150 F.3d 920 (8th Cir. 1998).

FRAP 24 Good Faith Standard Not High; 7:25; *Pate v. Steven*, 163 F.3d 437 (7th Cir. 1998).

Georgia Court Access Consent Decree Terminated; 10:8; Schirato, Christopher; *Lewis v. Evans*, USDC SD GA, Savannah Division, Case No. CV484-251.

Guard's Death Threats May Violate Eighth Amendment; 1:8; *Chandler v. D.C. Department of Corrections*, 145 F.3d 1355 (DC Cir. 1998).

Heck Not Applicable to Ad Seg; Only "Available" Exhaustion Required; 11:17; *York v. Huerta-Garcia*, 36 F.Supp.2d 1231 (SD CA 1999).

IFP Application Not Required When Suit Filed; 4:8; *Garrett v. Clarke*, 147 F.3d 745 (8th Cir. 1998).

Illinois Exhaustion Described; 7:10; *Jones v. DeTella*, 12 F.Supp.2d 824 (ND IL 1998).

Imminent Danger Overrides Three Strikes; 6:18; *Gibbs v. Cross*, 160 F.3d 962 (3rd Cir. 1998).

Individual Legislators May Intervene to Terminate Prison Suits; 5:10; Clarke, Matthew T.; *Ruiz v. Estelle*, 161 F.3d 814 (5th Cir. 1998).

Ninth Circuit Vacates Previous Opinion Ruling PLRA's Provision Unconstitutional; 12:12; *Taylor v. United States*, 181 F.3d 1017 (9th Cir. 1999)(en banc).

No Admin. Exhaustion Required for Monetary Claims; No Qual. Immunity for Malicious Use of Force; 3:12; *Holliman v. DeTella*, 6 F.Supp. 2d 968 (ND IL 1998); *Jackson v. DeTella*, 998 F.Supp. 901 (ND IL 1998).

No Administrative Exhaustion Requirement for Ex-Prisoners; 8:26; *Greig v. Goord*, 169 F.3d 165 (2nd Cir. 1999).

No Exhaustion Required in Wisconsin When Only Money Damages Are Sought; 9:18; *Davis v. Woehrer*, 32 F.Supp.2d 1078 (ED WI 1999).

No Leave to Amend Complaint for IFP Litigants; 4:9; *Lopez v. Smith*, 160 F.3d 567 (9th Cir. 1998).

No Written Screening or Administrative Exhaustion Required; 9:19; *Harris v. Ford*, 32 F.Supp.2d 1109 (D AK 1999).

Parole Change May Violate Ex Post Facto; Change Can Be Challenged Via § 1983; 4:24; *Anyanwutaku v. Moore*, 151 F.3d 1053 (DC Cir. 1998); *Blair-Bey v. Quick*, 159 F.3d 591 (DC Cir. 1998); *Blair-Bey v. Quick*, 151 F.3d 1036 (DC Cir. 1998).

Parole Officials Liable for False Information in Parole Violation Arrest Warrant; 6:17; *Friedland v. Fauver*, 6 F.Supp.2d 292 (D NJ 1998).

Pennsylvania Consent Decrees Terminated Under PLRA; 3:13; *Imprisoned Citizens Union v. Shapp*, 11 F.Supp. 2d 586 (ED PA 1998); *Vazquez v. Carver*, 18 F.Supp. 2d 503 (ED PA 1998).

Physical Injury Requirement Doesn't Apply to Court Access Claims; 9:19; *Lewis v. Sheahan*, 35 F.Supp.2d 633 (ND IL 1999).

Physical Injury Requirement Not Retroactive; 4:9; *Swan v. Banks*, 160 F.3d 1258 (9th Cir. 1998).

Physical Injury Rule Applied to Pre-PLRA Asbestos Exposure; 8:13; *Fontroy v. Owens*, 150 F.3d 239 (3rd Cir. 1998).

PLRA "Three Strikes" Provision Upheld; 3:13; *Evans v. Illinois DOC*, 150 F.3d 810 (7th Cir. 1998); *Young v. Miller*, 144 F.3d 1298 (10th Cir. 1998); *Ashley v. Dilworth*, 147 F.3d 715 (8th Cir. 1998).

PLRA Allows Fees on Fees in Failure to Protect Suit; 1:5; *Hernandez v. Kalinowski*, 146 F.3d 196 (3rd Cir. 1998).

PLRA Attorney Fee Cap Applies in \$65,000 Beating Case; 8:25; *Roberson v. Brassell*, 29 F.Supp.2d 346 (SD Tex. 1998).

PLRA Attorney Fee Cap Not Retroactive in Attorney Client Case; 11:28; *Rodriguez v. Zavaras*, 22 F.Supp.2d 1196 (D.Colo. 1997).

PLRA Attorney Fee Limits Not Retroactive in Second Circuit; 10:13; *Blissett v. Casey*, 147 F.3d 218 (2nd Cir. 1998).

PLRA Attorney Fee Provision Not Retroactive in Jail Conditions Suit; 11:28; *Inmates of DC Jail v. Johnson*, 158 F.3d 1357 (DC Cir. 1998).

PLRA Consent Decree Termination Provision Upheld by 2nd and 3rd Circuits; 8:24; *Benjamin v. Jacobson*, 172 F.3d 144 (2nd Cir. 1999)(en banc); *Imprisoned Citizens Union v. Ridge*, 169 F.3d 178 (2nd Cir. 1999).

PLRA Dismissals for Failure to Plead Physical Injury Reviewed De Novo; 9:27; *Perkins v. Kansas Dept. of Corrections*, 165 F.3d 803 (10th Cir. 1999).

PLRA Doesn't Affect Court Contempt Powers; 7:10; *Essex County Jail Annex Inmates v. Treffinger*, 18 F.Supp.2d 445 (D NJ 1998).

PLRA Doesn't Ban Class Actions; 4:9; *Anderson v. Garner*, 22 F.Supp.2d 1379 (ND GA 1997).

PLRA Doesn't Require Notice of Claim for Exhaustion; 8:26; *Blas v. Endicott*, 31 F.Supp.2d 1131 (ED WI 1999).

PLRA Exhaustion Requirement Not Retroactive; 4:8; *Bishop v. Lewis*, 155 F.3d 1094 (9th Cir. 1998).

PLRA Fee Provisions Apply to All Pending Cases in the Fifth Circuit; 4:8; *Larson v. Scott*, 157 F.3d 1030 (5th Cir. 1998).

PLRA Immediate Termination Provisions Unconstitutional; 1:5; *Denike v. Fauver*, 3 F.Supp.2d 540 (D NJ 1998).

PLRA Physical Injury and Administrative Exhaustion Requirements Not Retroactive; 7:10; *Cunningham v. Eyman*, 11 F.Supp.2d 969 (ND IL 1998).

PLRA Physical Injury Requirement Constitutional; 9:16; Quigley, James; *Davis v. District of Columbia*, 158 F.3d 1342 (DC Cir. 1998).

PLRA Physical Injury Requirement Not Retroactive; 7:11; *Craig v. Eberly*, 164 F.3d 490 (10th Cir. 1998).

Prisoner Must Show Imminent Danger at Time of IFP Request to Avoid PLRA Three-Strikes Dismissal; 5:10; *Choyce v. Dominguez*, 160 F.3d 1068 (5th Cir. 1998).

Prisoner Strip Search Warrants Fourth Amendment Analysis; 11:15; Young, Ronald; *Moore v. Carwell*, 168 F.3d 234 (5th Cir. 1999).

Prisoners Have First Amendment Right to Private Conversations with Their Attorneys; 9:21; *Williams v. Price*, 25 F.Supp.2d 623 (WD PA 1998).

Race Discrimination Claim Not Barred by PLRA Physical Injury Rule; 11:25; *Mason v. Schriro*, 45 F.Supp.2d 709 (WD MO 1999).

Seventh Circuit Clarifies Good Faith Appeal Standard, Again; 8:27; *Hyche v. Christensen*, 170 F.3d 769 (7th Cir. 1999).  
 Sleep Deprivation Not Frivolous Claim; 12:23; Young, Ronald; *Harper v. Showers*, 174 F.3d 716 (5th Cir. 1999).  
 State Court Dismissals Don't Count as Strikes; 9:18; *Freeman v. Lee*, 30 F.Supp.2d 52 (D DC 1998).  
 Supreme Court Holds PLRA Attorney Fee Cap Inapplicable to Work Performed Before Enactment; 10:12; Clarke, Matthew T.; *Martin v. Hadix*, 119 S.Ct. 1998 (1999).  
 Third Circuit Holds 28 USC § 1915(g) Does Not Apply Retroactively; 9:18; *Gibbs v. Ryan*, 160 F.3d 160 (3rd Cir. 1998).  
 Three Strikes Upheld by Ninth Circuit; 9:18; *Rodriguez v. Cook*, 169 F.3d 1176 (9th Cir. 1999).  
 Total Administrative Exhaustion Not Required; 9:18; *Jenkins v. Toombs*, 32 F.Supp.2d 955 (WD MI 1999).

### Prison Rebellion

California Visits Reinstated after Food Boycott (Letter); 11:16; D.R.  
 Florida Prison Erupts; 7:12.  
 Former Guinea Pigs Protest; 3:3.  
 New Mexico Riot Rooted in Religious Rights; 9:11.  
 Riots Rock CCA Prison in Oklahoma; 12:16.  
 The Way the Wind Blew: A History of the Weather Underground, by Ron Jacobs (Review); 9:9; Wright, Paul.  
 Wackenhut's Woes: Guard Killed in New Mexico Riot; Prisoners Exiled to Virginia Supermax; 12:1; Friedmann, Alex.  
 Washington Prisoners Brutalized in Colorado Private Prison; 6:10.  
 Washington Prisoners Damage Colorado Private Prison; 6:10.  
 Wisconsin Prisoners Stage Food Protest; 7:10.  
 Wisconsin Resists Out-of-State Transfers; 3:9.

### Prisoner Legal Assistance

No Right to Mutual Legal Assistance in 11th Circuit; 2:22; *Bass v. Singletary*, 143 F.3d 1442 (11th Cir. 1998).  
 Retaliatory Acts Need Not "Shock the Conscience" to be Actionable; 11:18; Clarke, Matthew T.; *Thaddeus-X v. Blatter*, 175 F.3d 378 (6th Cir. 1999)(en banc).

### Prisoner Privileges

IDEA Confers Right to Education Even in SHU; 7:20; *State of NH v. Adams*, 159 F.3d 680 (1st Cir. 1998).  
 Kansas Good Time Rules Violate Ex Post Facto; 3:20; *Banks v. Simmons*, 963 P.2d 412 (Kansas 1998).  
 Kansas Good Time Rules Violate Ex Post Facto; 3:20; *Stansbury v. Hannigan*, 960 P.2d 227 (Kansas 1998).  
 Michigan's Female Prisoners Have Educational Parity; 10:15; *Glover v. Johnson*, 35 F.Supp.2d 1010 (ED MI 1999).  
 Open Society Institute Funds College Classes in Maryland Prisons; 1:8.  
 South Carolina Grooming Rules Upheld; 3:21; *Hines v. South Carolina DOC*, 148 F.3d 353 (4th Cir. 1998).  
 West Virginia Supreme Court Upholds Computer Ban; 11:22; *State ex rel Anstey v. Davis*, 509 SE 2d 579, 203 W.Va. 538 (WV 1998).

### Prisoners-International

*Behind Bars in Brazil* (Review of Human Rights Watch Report); 7:5; Lutsky, Julia.  
 South Korea Frees Political Prisoner after 41 Years; 7:7.

### Private Prisons

Abuse of Prisoners Confirmed at CCA Facility; 2:18.  
 CCA Prison Realty Merger Approved; 6:11; Friedmann, Alex.  
 CCA Settles Youngstown Suit for \$2.48 Million; 8:14; *In Re*

*Northeast Ohio Correctional Centers*, USDC ND OH, 4:97:CV-1995.

CCPOA Pimping in the California State Assembly; 11:9; Pens, Dan.  
 CMS Settles Wrongful Death Suit for \$75,000; 6:13; *Murphy v. CMS*, New Castle Co. Superior Court, DE, 95C-07-148SCD.  
 CSC Cancels Florida Juvenile Facility Contract; 12:11.  
 FBI Investigates CCA-Run INS Center in New Jersey; 10:10.  
 Go Directly to Jail: At the Academy in Alpharetta, Men Pay Big Bucks to Pretend They're in Prison; 10:16; Savage, Dan.  
 Juvenile Crime Still Pays — But at What Cost?; 1:1; Friedmann, Alex.  
 Juveniles Held Hostage for Profit by CSC in Florida; 6:15; Friedmann, Alex.  
 Missouri Proposes \$2.2 Million Settlement; 9:11.  
 New Mexico Riot Rooted in Religious Rights; 9:11.  
 No Qualified Immunity for Texas Sheriff and CCRJ Guards Who Abused Missouri Prisoners; 8:18; Clarke, Matthew T.; *Kesler v. King*, 29 F.Supp.2d 356 (SD Tex. 1998).  
 Our Sisters' Keepers; 2:1; Burton-Rose, Daniel.  
 Prison Realty Board Member Settles Ethics Complaints; 9:12.  
 Prison Realty Stock Plummets; Shareholders File Suit; 11:13.  
 Private Prison Denied Wiretap Exception; 9:20; *Huguenin v. Ponte*, 29 F.Supp.2d 57 (D RI 1998).  
 Private Prison Escape Explained; 6:6.  
 Private Prison Guard Is State Actor for § 1983 Purposes; 7:14; *Giron v. CCA*, 14 F.Supp.2d 1245 (D NM 1998).  
 Private Prison Operators Enter Medical Care Market; 8:12; Friedmann, Alex.  
 Private Prisons in the United States: An Assessment of Current Practice (Review of Report); 5:8; Friedmann, Alex.  
 Private Transportation Company Liable Under 42 USC § 1983; 10:15; *Gwynn v. TransCor America, Inc.*, 26 F.Supp.2d 1256 (D Colo. 1998).  
 Riots Rock CCA Prison in Oklahoma; 12:16.  
 Tennessee Supreme Court Upholds Private Prison Disciplinary Procedures; 9:12; *Mandela v. Campbell*, 978 S.W.2d 531 (Tenn. 1998).  
 Trial Required in ADA Suit over HIV Medication; 12:19; *McNally v. Prison Health Services*, 52 F.Supp.2d 147 (D ME 1999); *McNally v. Prison Health Services*, 46 F.Supp.2d 49 (D ME 1999).  
 University Professor Shills for Private Prison Industry; 2:10; Friedmann, Alex.  
 Violence Takes a Toll at New Mexico Wackenhut Prison; 6:12; Young, Ronald.  
 Wackenhut's Woes: Guard Killed in New Mexico Riot; Prisoners Exiled to Virginia Supermax; 12:1; Friedmann, Alex.  
 Washington Prisoners Brutalized in Colorado Private Prison; 6:10.  
 Washington Prisoners Damage Colorado Private Prison; 6:10.  
 Wisconsin Resists Out-of-State Transfers; 3:9.

### Property

Seventh Circuit Defines Court Access Claims Involving Property; 4:18; *Nance v. Vierrege*, 147 F.3d 589 (7th Cir. 1998).

### Racial Discrimination

A Nation's Gratitude; 5:6; Abu-Jamal, Mumia.  
 Franklin Reversed; DC Prisoners Have No Right to Qualified Interpreters; 8:17; *Franklin v. District of Columbia*, 163 F.3d 625 (DC Cir. 1999); *Franklin v. District of Columbia*, rehearing denied, 168 F.3d 1360 (DC Cir. 1999).  
 Illinois KKK Guard Loses Lawsuits, Goes to Prison; 5:7; Wright, Paul; *Weicherding v. Riegel*, 160 F.3d 1139 (7th Cir. 1998).  
 New Jersey Guard's Killer Gets Life; 5:19.

Race Discrimination Claim Not Barred by PLRA Physical Injury Rule; 11:25; *Mason v. Schriro*, 45 F.Supp.2d 709 (WD MO 1999).

Racial Segregation in Double Celling Unconstitutional; 10:21; *Simpson v. Horn*, 25 F.Supp.2d 563 (ED PA 1998).

White Guard, Black Guard: Racism in Washington Continues; 5:12; Vogel, Jennifer.

## Religious Freedom

\$7,000 Award to Prisoner Shoved by Guard while Praying; 11:8; *Arroyo Lopez v. Nutall*, 25 F.Supp.2d 409 (SD NY 1998).

AA Probation Requirement Continues to Violate Establishment Clause; 8:22; *Warner v. Orange County Dept. of Probation*, 173 F.3d 120 (2nd Cir. 1999).

Arizona DOC Settles Kosher Diet Suit; 9:14; *Ashelman v. Wawraszek*, Unpublished Settlement.

Arkansas Sheriff Bent on "Saving" Prisoners; 3:16.

Dismissal of Haircut Suits Reversed; 12:25; *Cofer v. Schriro*, 176 F.3d 1082 (8th Cir. 1999).

Dismissal of Haircut Suits Reversed; 12:25; *Williams v. Norris*, 176 F.3d 1089 (8th Cir. 1999).

First Amendment Guarantees Kosher Meals; 8:15; *Johnson v. Horn*, 150 F.3d 276 (3rd Cir. 1998).

New Mexico Riot Rooted in Religious Rights; 9:11.

South Carolina Grooming Rules Upheld; 3:21; *Hines v. South Carolina DOC*, 148 F.3d 353 (4th Cir. 1998).

Tarrant County Jail's Christian Education Unit May Violate Texas and Federal Establishment Clauses; 8:21; *Lara v. Williams*, 986 SW2d 310 (Tex.App.-Fort Worth 1999).

## Resources and Reviews

*A Guide to the Prison Litigation Reform Act*, by John Boston (Review); 11:16; Wright, Paul.

*Acres of Skin: Human Experiments at Holmesburg Prison* by Allen M. Hornblum (Book Review); 3:6; Burton-Rose, Daniel.

*Behind Bars in Brazil* (Review of Human Rights Watch Report); 7:5; Lutsky, Julia.

*Behind the Razor Wire: Portrait of a Contemporary American Prison System* (Review); 5:9; Wright, Paul.

Book Review: *Breaking the Walls of Silence*; 2:4; Whitehorn, Laura.

*California Habeas Handbook: A Practical Guide to Habeas Law for California Prisoners* (Review); 5:9.

*Crime and Punishment in America*, by Elliot Currie (Review); 9:8; Franklin, H. Bruce.

*Indictment: The News Media and the Criminal Justice System* (Book Review); 6:5; Friedmann, Alex.

*Jailhouse Journalism: The Fourth Estate Behind Bars*, by James McGrath (Book Review); 4:6; Wright, Paul.

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*Losing the Vote: The Impact of Felony Disenfranchisement Laws in the United States* (Book Review); 4:7; Friedmann, Alex.

*Maximum Security University*, edited by Tom Quinn (Book and Video Review); 12:8; Fischer, Bob; Stanton, Janet; Wright, Paul.

*No Equal Justice: Race and Class in the American Criminal Justice System*, by David Cole (Review); 8:4; Friedmann, Alex.

*Prison Madness*, by Terry Kupers, MD (Book Review); 6:4; Pens, Dan.

*Private Prisons in the United States: An Assessment of Current Practice* (Review of Report); 5:8; Friedmann, Alex.

Public Access to Documents Resources; 5:9; Wright, Paul.

Publication Reviews; 5:9.

*Sensible Justice: Alternatives to Prison*, by David C. Anderson (Book Review); 3:6; Burton-Rose, Daniel.

*The Mentally Disordered Inmate and the Law*, by Fred Cohen (Book

Review); 7:4; Wright, Paul.

*The Sounding Tree: Voices Along the Razor Wire*, by Lee Dickenson (Book Review); 5:8; Burton-Rose, Daniel.

*The Way the Wind Blew: A History of the Weather Underground*, by Ron Jacobs (Review); 9:9; Wright, Paul.

## Retaliation

\$130,000 in Damages and Fees Awarded in New York Retaliation Suit; 7:21; *Alnutt v. Cleary*, 27 F.Supp.2d 395 (WD NY 1998).

Adequate Opportunity for Discovery Required; 7:19; *Davis v. Kelly*, 160 F.3d 917 (2nd Cir. 1998).

Arkansas Department of Corruption Revealed; 9:7; *Campbell v. Arkansas DOC*, 155 F.3d 950 (8th Cir. 1998).

CDC Whistleblower Gets \$1.7 Million; 10:23.

County Jail Political Shenanigans, Corruption Revealed; 9:7; *Knight v. Vernon*, 23 F.Supp.2d 634 (MD NC 1998).

Edwards No Bar to Seg Suit; 7:22; *Johnson v. Freeburn*, 29 F.Supp.2d 764 (ED MI 1998).

Guard Socked for \$37,500 in Vendetta; 2:15.

Human Rights Report Details Women in Prison; 2:2.

Media Interview Protected Free Speech; 10:11; *Castle v. Clymer*, 15 F.Supp.2d 640 (ED PA 1998).

New York Retaliation Suit Nets \$100,000 in Damages; 11:13.

Parole Officer Recommendation Not Protected by Absolute Immunity; 2:20; *Scotto v. Almenas*, 143 F.3d 105 (2nd Cir. 1998).

Retaliation Suit States Claim; 7:24; *Lewis v. Cook Co. Dept. of Corrections*, 28 F.Supp.2d 1073 (ND IL 1998).

Retaliation Verdict Remanded for Damages; 12:26; *Trobaugh v. Hall*, 176 F.3d 1087 (8th Cir. 1999).

Retaliatory Acts Need Not "Shock the Conscience" to be Actionable; 11:18; Clarke, Matthew T.; *Thaddeus-X v. Blatter*, 175 F.3d 378 (6th Cir. 1999)(en banc).

Retaliatory Beating of Prisoner Is Triable Fact Issue; 3:25; *Mahotep v. DeLuca*, 3 F.Supp. 2d 385 (ND NY 1998).

*Samuels v. Mockry* Reversed Once Again; 2:10; *Samuels v. Mockry*, 142 F.3d 134 (2nd Cir. 1998).

Texas Jail Whistleblower Awarded \$3.3 Million; 9:14.

Threats to File Grievances Protected; 2:9; *Sprau v. Coughlin*, 997 F.Supp. 390 (WDNY 1998).

## Searches

BOP Visitors Subjected to Ion Scan; 1:4.

Felony Trial for Planted Knife Is Malicious Prosecution; 2:5; *Klein v. Coblenz*, No. 96-1289 (10th Cir. 1998).

Kentucky Jail Settles Strip Search Suit for \$11.5 Million; 8:7.

New York City Arrestee Awarded \$5.02 Million in Strip Search; 11:6.

No Admin. Exhaustion Required for Monetary Claims; No Qual. Immunity for Malicious Use of Force; 3:12; *Holliman v. DeTella*, 6 F.Supp. 2d 968 (ND IL 1998).

No Admin. Exhaustion Required for Monetary Claims; No Qual. Immunity for Malicious Use of Force; 3:12; *Jackson v. DeTella*, 998 F.Supp. 901 (ND IL 1998).

No Qualified Immunity for Texas Sheriff and CCRI Guards Who Abused Missouri Prisoners; 8:18; Clarke, Matthew T.; *Kesler v. King*, 29 F.Supp.2d 356 (SD Tex. 1998).

No Suspicion Required for California Parolee Searches; 7:20; *People v. Reyes*, 80 Cal.Rptr. 734, 968 P.2d 445 (Cal. 1998).

PLRA Immediate Termination Provisions Unconstitutional; 1:5; *Denike v. Fauver*, 3 F.Supp.2d 540 (D NJ 1998).

Prisoner Strip Search Warrants Fourth Amendment Analysis; 11:15; Young, Ronald; *Moore v. Carwell*, 168 F.3d 234 (5th Cir. 1999).

Transsexual Awarded \$755,000 in Jail Strip Search; 9:15.

Utah Strip Search Suit Settled; 1:11; *Hansen v. Jorgensen*, USDC

Utah, 91-CV-991.

## Seizure of Prisoner Funds

Arizona Can't Seize All Prison Labor Back Wages; 12:15; *Ford v. State*, 979 P.2d 10 (Ariz.App.Div.1, 1999).  
BOP Warden Held in Contempt for Failure to Forward PLRA Filing Fee; 8:27; *Hall v. Stone*, 170 F.3d 706 (7th Cir. 1999).  
Costs Imposed Regardless of Ability to Pay; 8:24; *Talley-Bey v. Knebl*, 168 F.3d 884 (6th Cir. 1999).  
Eighth Circuit Upholds, Defines IFP Provisions; 4:8; *Lefkovowitz v. Citi-Equity Group Inc.*, 146 F.3d 609 (8th Cir. 1998).  
Eighth Circuit Upholds, Defines IFP Provisions; 4:8; *Murray v. Dosal*, 150 F.3d 814 (8th Cir. 1998).  
Indiana May Not Deny Pay and Educational Programs to Protective Custody Prisoners; 4:20; *Faver v. Bayh*, 689 N.E.2d 727 (Ind.Ct.App. 1997).  
Nevada Guards Party with Inmate Welfare Fund; 11:12.  
Request for Telephonic Appearance Must Be Considered; 11:24; *State Bureau of Child Support Services v. Garcia*, 975 P.2d 793 (Idaho App. 1999).  
Seizure of Trust Account Interest Violates Takings Clause; 4:26; *Schneider v. California Dept. of Corrections*, 151 F.3d 1194 (9th Cir. 1998).  
Tennessee Prisoners Fight to Keep Money; 1:6.  
Washington 35% Law Struck Down by State Court; 8:8; *Dean v. Lehman*, King County Superior Court, 97-2-12906-1SEA.  
Washington 35% Spousal Suit Update; 9:14; *Dean v. Lehman*, WA Supreme Court, 68281-0.  
Washington 35% Statute Upheld in State Court; 2:11; *In Re Metcalf*, 963 P.2d 911, 92 Wn.App. 165 (WA App.Div.1, 1998).  
Washington Court of Appeals Holds Restitution Orders Invalid; 12:24; *State v. Burmaster*, 979 P.2d 442 (Wash.App.Div. 1 1999).  
Washington DOC Illegally Penalizes Indigents; 8:9; *Smith v. State of Washington*, Thurston County Superior Court, 98-2-01666-1.  
Washington Legislature Amends 35% Law, Again; 8:8; Wright, Paul.  
Washington Restitution Order Expired Ten Years After Release; 7:19; *In Re Sappenfield*, 964 P.2d 1204 (Wash. App. Div. I 1998).

## Settlements

\$100,000 Settlement in South Carolina Jail Death; 11:17.  
\$90,000 Settlement in Utah Jail Suicide; 10:14; *Estate of Henry Delgado v. Salt Lake County*, USDC D UT, 2:99-CV-39-B.  
AHCC Bulk Mail Ban in Miniken Settled; 3:17; *Miniken v. Walter*, 9th Cir. Case No. 97-35913, 97-36072.  
Attorney Fees Must Be Expressly Reserved; 8:14; *Wray v. Clarke*, 151 F.3d 808 (8th Cir. 1998).  
CCA Settles Youngstown Suit for \$2.48 Million; 8:14; *In Re Northeast Ohio Correctional Centers*, USDC ND OH, 4:97-CV-1995.  
CDC Settles Corcoran Shooting Suit for \$2.2 Million; 12:9.  
CDC Settles Excessive Force Suit for \$1,000; 10:14; Gann, John; *Gann v. Lytle*, USDC ED CA, CIV-S-95-0022LKK-JFM.  
CMS Settles Wrongful Death Suit for \$75,000; 6:13; *Murphy v. CMS*, New Castle Co. Superior Court, DE, 95C-07-148SCD.  
Corcoran Shooting Death Suit Settled for \$825,000; 5:18; *Estate of Preston Tate v. Gomez*, USDC ED CA, CV-F-95-5239-DLB.  
Ex-Prisoner Gets \$850,000 for Broken Neck; 9:7.  
Florida Nicotine Addiction Suit Settled; 3:15; *Waugh v. Singletary*, USDC MD FL (Jacksonville), 95-605-CIV-J-20A.  
Jury Awards \$2.3 Million for Slain San Quentin Prisoner, State Settles for \$2.5 Million; 5:3; Wisely, Willie.

Kentucky Jail Settles Strip Search Suit for \$11.5 Million; 8:7.  
New Jersey Jail Settles Chemical Burn Suit for \$900,000; 12:16; *Zamot v. County of Atlantic County*, USDC D NJ, Camden Vicinage, 97-CV-4220.  
New York Jail Brutality Suit Settled for \$3,500; 4:23; *Massey v. City of New York, et al.*, USDC SD NY, 97CIV-7607(LAP).  
Pennsylvania Brutality Suit Settled for \$5,000; 6:19; *DeJesus v. Peters*, USDC ED PA, 95-1005.  
PLN Writer Settles Nude Photo Suit for \$3,000; 2:14; *Quigley v. Atmore, et al.*, USDC 95-1138-Civ-T-24E (M.D.Fla.).  
Rikers Island Brutality Suit Settled; 2:16; Chasan, Jonathan; *Sheppard v. Phoenix* USDC 91-civ-4148 (RPP)  
Settlement in Deaf Washington State Prisoners' Lawsuit; 2:12; Crollard, Jeff; *Duffy v. Riveland*, Case No. C92-1596R & C93-637R (W.D. Wash.).  
Texas Settles with Hanged Prisoner's Family; 10:19.  
Utah Jail Censorship Suit Settled for \$68,682; 5:6; *Ayala v. Davis Co. Utah*, USDC D UT, 1-96-CV-00030C.  
Utah Strip Search Suit Settled; 1:11; *Hansen v. Jorgensen*, USDC Utah, 91-CV-991.

## Sexual Assault/Harassment

1999 Washington Legislative Roundup; 12:14.  
Arizona DOC Settles Sexual Abuse Suit; 10:9.  
California Guards Indicted in Rapes; 2:8; Wisely, Willie.  
Eighth Circuit Reinstates \$80,000 Damage Award in Rape Case; 2:19; *Berry v. Oswalt*, 143 F.3d 1127 (8th Cir. 1998).  
Former Jail Prisoner Awarded \$8,000 for Abuse; PLRA Attorney Fee Limit Inapplicable to Juveniles; 4:5; *Doe by and through Doe v. Washington County*, 150 F.3d 920 (8th Cir. 1998).  
Guard Raped, Entire Texas Prison System Locked Down; 5:17.  
Human Rights Report Details Women in Prison; 2:2.  
Juvenile Crime Still Pays — But at What Cost?; 1:1; Friedmann, Alex.  
New Jersey Guard Wins \$3.75 Million Harassment Suit; 11:5; *Lockley v. New Jersey*, Burlington County, L03195-94.  
New York Prison Guard Nailed with DNA Evidence; 2:8.  
Our Sisters' Keepers; 2:1; Burton-Rose, Daniel.  
Private Prison Guard Is State Actor for § 1983 Purposes; 7:14; *Giron v. CCA*, 14 F.Supp.2d 1245 (D NM 1998).  
Private Transportation Company Liable Under 42 USC § 1983; 10:15; *Gwynn v. TransCor America, Inc.*, 26 F.Supp.2d 1256 (D Colo. 1998).  
Texas Settles with Hanged Prisoner's Family; 10:19.  
Victim of Guard Rape Awarded \$50,000; 2:17; *Ware v. Jackson County, Mo.*, 150 F.3d 873 (8th Cir. 1998).  
Warden May Be Liable for Rape; 3:22; *Spruce v. Sargent*, 149 F.3d 783 (8th Cir. 1998).  
Warden Used "Force" in Sexual Assault; 8:12; *United States v. Lucas*, 157 F.3d 998 (5th Cir. 1998).

## State Law Claims

Arizona Can't Seize All Prison Labor Back Wages; 12:15; *Ford v. State*, 979 P.2d 10 (Ariz.App.Div.1, 1999).  
Arizona Prisoners Can Pay Filing Fee in Installments; 7:18; *Inzunza-Ortega v. Superior Court*, 968 P.2d 631 (Ariz. App. Div. I 1998).  
Cancellation of TDCJ/VitaPro Contract Reversed; 2:21; *VitaPro Foods v. Department of Criminal Justice*, 969 SW 2d 84 (Tex.App.-Texarkana 1998).  
Colorado Contraband Rule Requires Visitor Notice; 2:23; *People v. Holmes*, 959 P.2d 406 (Colo. 1998).  
*Duffy v. Riveland*: Some Comments Regarding the Court's January 20, 1998 Summary Judgment Ruling; 2:12; Feldman,

Leonard; *Duffy v. Riveland*, Case No. C92-1596R & C93-637R (W.D. Wash.).

Eighth Circuit Reinstates \$80,000 Damage Award in Rape Case; 2:19; *Berry v. Oswalt*, 143 F.3d 1127 (8th Cir. 1998).

Indiana May Not Deny Pay and Educational Programs to Protective Custody Prisoners; 4:20; *Faver v. Bayh*, 689 N.E.2d 727 (Ind.Ct.App. 1997).

Kansas Good Time Forfeiture Violates Ex Post Facto; 7:17; *Garner v. Nelson*, 963 P.2d 1242 (Kan. App. 1998).

Kansas Good Time Rules Violate Ex Post Facto; 3:20; *Stansbury v. Hannigan*, 960 P.2d 227 (Kansas 1998); *Banks v. Simmons*, 963 P.2d 412 (Kansas 1998).

Missouri Ends Ad Seg Ban on Publications; 7:8; *White-Bey v. Missouri DOC*, 24th Judicial Circuit, Wash. Co., CV-1098-435cc.

New Hampshire Prisoners Gain the Vote; 5:18; *Fischer v. Shaheen, et al*, Merrimack Superior Court Docket No. 98-E-402.

New Jersey Guard Wins \$3.75 Million Harassment Suit; 11:5; *Lockley v. New Jersey*, Burlington County, L03195-94.

No Suspicion Required for California Parolee Searches; 7:20; *People v. Reyes*, 80 Cal.Rptr. 734, 968 P.2d 445 (Cal. 1998).

Oregon "Predatory Sex Offender" Label Requires Notice and Hearing; 4:14; *Noble v. Board of Parole*, 327 Or. 485, 964 P.2d 990 (1998).

Pennsylvania Supreme Court Draws the Line on Jailhouse Snitches; 3:15; *Commonwealth of Pennsylvania v. Franciscus*, 710 A.2d 1112 (Penn. 1998).

Prisoners Entitled to Money Damages and Injunctive Relief under ADA and RA; 2:22; *Key v. Grayson*, 998 F.Supp. 793 (E.D. Mich. 1998).

Private Prison Guard Is State Actor for § 1983 Purposes; 7:14; *Giron v. CCA*, 14 F.Supp.2d 1245 (D NM 1998).

Request for Telephonic Appearance Must Be Considered; 11:24; *State Bureau of Child Support Services v. Garcia*, 975 P.2d 793 (Idaho App. 1999).

Retroactive Kansas Good Time Recalculation Unlawful; 3:20; *Steltzen v. McKune*, No. 77,897 (Kansas Court of Appeals 9-5-97, unpub).

South Carolina Parole Elimination Violates Ex Post Facto; 4:15; *Phillips v. State of South Carolina*, 504 So.2d 111 (South Carolina 1998).

Tarrant County Jail's Christian Education Unit May Violate Texas and Federal Establishment Clauses; 8:21; *Lara v. Williams*, 986 SW2d 310 (Tex.App.-Fort Worth 1999).

Tennessee Supreme Court Upholds Private Prison Disciplinary Procedures; 9:12; *Mandela v. Campbell*, 978 S.W.2d 531 (Tenn. 1998).

Texas Courts Must Hold Hearing Before Dismissing Suit for Having No Arguable Basis in Fact; 7:20; *Lentworth v. Traham*, 981 SW2d 720 (Tex.App. Houston 1st Dist. 1998).

Washington 35% Law Struck Down by State Court; 8:8; *Dean v. Lehman*, King County Superior Court, 97-2-12906-1SEA.

Washington 35% Spousal Suit Update; 9:14; *Dean v. Lehman*, WA Supreme Court, 68281-0.

Washington 35% Statute Upheld in State Court; 2:11; *In Re Metcalf*, 963 P.2d 911, 92 Wn.App. 165 (WA App.Div.1, 1998).

Washington Court of Appeals Holds Restitution Orders Invalid; 12:24; *State v. Burmaster*, 979 P.2d 442 (Wash.App.Div. 1 1999).

Washington DOC Illegally Penalizes Indigents; 8:9; *Smith v. State of Washington*, Thurston County Superior Court, 98-2-01666-1.

Washington Felony Infraction Law Struck Down; 11:23; *State v. Brown*, 977 P.2d 1242, 95 Wa.App. 952 (Wa.App.Div.3, 1999).

Washington Good Time Ban Unconstitutional; 12:27; *State v. Cloud*, 95 Wn.App. 606, 976 P.2d 649 (Wa.App.Div. 1, 1999).

Washington Restitution Order Expired Ten Years After Release; 7:19; *In Re Sappenfield*, 964 P.2d 1204 (Wash. App. Div. I 1998).

West Virginia Supreme Court Upholds Computer Ban; 11:22; *State ex rel Anstey v. Davis*, 509 SE 2d 579, 203 W.Va. 538 (WV 1998).

## State Legislation

1999 Washington Legislative Roundup; 12:14.

California Governor Vetoes Parole Reform Bill; 11:14.

CCPOA Pimping in the California State Assembly; 11:9; Pens, Dan.

Nevada Guards Party with Inmate Welfare Fund; 11:12.

Washington Legislature Amends 35% Law, Again; 8:8; Wright, Paul.

## Supreme Court

Attorney Fee Cap Inapplicable to Pre-PLRA Suits; PLRA Automatic Stay Provisions Constitutional; 2:6; *Hadix v. Johnson*, 143 F.3d 246 (6th Cir. 1998); *Hadix v. Johnson*, 144 F.3d 925 (6th Cir. 1998).

Supreme Court Holds PLRA Attorney Fee Cap Inapplicable to Work Performed Before Enactment; 10:12; Clarke, Matthew T.; *Martin v. Hadix* 119 S.Ct. 1998 (1999)

US Supreme Court Holds Media Ride-Alongs Unconstitutional; 9:15; *Wilson v. Layne*, 119 S.Ct. 1692 (1999); *Hanlon v. Berger*, 119 S.Ct. 1706 (1999).

## Telephones

Class Action Suits Challenge Rip-Off Prison and Jail Phone Rates; 8:10; *Arsberry v. State of Illinois*, USDC ND IL, 99-C-2457.

Class Action Suits Challenge Rip-Off Prison and Jail Phone Rates; 8:10; *Daleure v. Kentucky*, USDC WD KY, Louisville Division, 3:97CV-709H.

FCC Requires Rate Disclosure for Prison Phones; 8:10.

Kentucky Utilities Commission Reduces Prison and Jail Phone Rates; 8:11.

Private Prison Denied Wiretap Exception; 9:20; *Huguenin v. Ponte*, 29 F.Supp.2d 57 (D RI 1998).

## Three Strikes

Washington Good Time Ban Unconstitutional; 12:27; *State v. Cloud*, 95 Wn.App. 606, 976 P.2d 649 (Wa.App.Div. 1, 1999).

## Unpublished Opinions

Felony Trial for Planted Knife Is Malicious Prosecution; 2:5; *Klein v. Coblenz*, No. 96-1289 (10th Cir. 1998).

Indiana Jail Ban on Publications Struck Down; 2:23; *Moss v. Speybroeck*, USDC, ND IN, Southbend Division, 3:97-CV-378RM.

Retroactive Kansas Good Time Recalculation Unlawful; 3:20; *Steltzen v. McKune*, No. 77,897 (Kansas Court of Appeals 9-5-97, unpub).

Washington 35% Law Struck Down by State Court; 8:8; *Dean v. Lehman*, King County Superior Court, 97-2-12906-1SEA.

Washington DOC Illegally Penalizes Indigents; 8:9; *Smith v. State of Washington*, Thurston County Superior Court, 98-2-01666-1.

## Visiting

BOP Visitors Subjected to Ion Scan; 1:4.

California Visits Reinstated after Food Boycott (Letter); 11:16; D.R.

Colorado Contraband Rule Requires Visitor Notice; 2:23; *People v. Holmes*, 959 P.2d 406 (Colo. 1998).

Washington EFV Cut-Off Date Questioned; 7:23; *Daniel v. Rolfs*, 29 F.Supp.2d 1184 (ED WA 1998).

## Voting

5th Circuit Upholds Mississippi Disenfranchisement Law; 5:24; *Cotton v. Fordice*, 157 F.3d 388 (5th Cir. 1998).  
Arizona Jail Slave Labor Used to Stuff Ballot Envelopes; 1:7.  
Losing the Vote: The Impact of Felony Disenfranchisement Laws in the United States (Book Review); 4:7; Friedmann, Alex.  
New Hampshire Prisoners Gain the Vote; 5:18; *Fischer v. Shaheen, et al*, Merrimack Superior Court Docket No. 98-E-402.  
Work Release Prisoners Eligible to Vote on Union Representation; 3:23; *Speedrack Products Group, Ltd.*, 325 NLRB 109 (1998).

## Women Prisoners

Arizona DOC Settles Sexual Abuse Suit; 10:9.  
Book Review: *Breaking the Walls of Silence*; 2:4; Whitehorn, Laura.  
Eighth Circuit Reinstates \$80,000 Damage Award in Rape Case; 2:19; *Berry v. Oswalt*, 143 F.3d 1127 (8th Cir. 1998).  
Human Rights Report Details Women in Prison; 2:2.  
Is Health Care Too Much to Ask For?; 9:5; Talvi, Silja J.A.; *Shumate v. Wilson*, No Cite.  
Michigan Department of Corrections Fined \$300,000 in Contempt Case; 4:5; *Glover v. Johnson*, 9 F.Supp.2d 799 (ED MI 1998).  
Michigan's Female Prisoners Have Educational Parity; 10:15; *Glover v. Johnson*, 35 F.Supp.2d 1010 (ED MI 1999).  
Notes from the Unrepententiary; 6:6; Whitehorn, Laura.  
Our Sisters' Keepers; 2:1; Burton-Rose, Daniel.  
Suicides at Connecticut Prison Raise Concerns about Mental Health Care; 11:14.  
Suicides Plague Florida Women's Prison; 5:11; Friedmann, Alex.  
Victim of Guard Rape Awarded \$50,000; 2:17; *Ware v. Jackson County, Mo.*, 150 F.3d 873 (8th Cir. 1998).  
Wreaking Medical Mayhem in Washington Prisons; 9:1; Herivel, Tara; *Hallett v. Payne*, USDC WD WA, 93-5496.

## BOP Can't Keep Prisoner Who Refuses to Pay Fine Indefinitely

A federal district court judge in Virginia held that a prisoner's refusal to sign an Agreement to pay a court ordered fine does not allow the Bureau of Prisons (BOP) to keep him imprisoned indefinitely. This ruling amply illustrates the vast power and arrogance of the BOP. Its facts are unusual to say the least.

Jabari Zakiya was sentenced to 16 months in federal prison for tax evasion and failing to file income tax returns. He was also fined \$25,000, given three years supervised release and a \$200 special assessment. He self reported to prison on January 5, 1995 and his sentence, with no good time reductions, should have ended on May 5, 1996. His good time release date was February 29, 1996.

Prior to his scheduled good time release date, the BOP gave Zakiya a form to sign whereby he would agree to pay, while on supervised release, the remaining balance of the fine. Zakiya refused to sign the form for political reasons and has languished in prison ever since, years after his sentence expired! The BOP insists that it can keep Zakiya in prison until he dies if he does not sign the form.

Various pro se habeas petitions went nowhere. Eventually Zakiya retained counsel who filed the instant habeas motion under 28 U.S.C. § 2241.

The BOP claimed that 18 U.S.C. § 3624(e) gives it the power to keep prisoners indefinitely until they agree to pay assessed fines. The court rejected the "astounding implications" of the BOP's reading of the statute. The court held that it violates the separation of powers doctrine for congress to give an executive branch agency, the BOP, the power to extend a prison sentence beyond that imposed by the judicial branch, a judge.

Rather than find § 3624(e) itself unconstitutional, the court held that under 18 U.S.C. § 4042, the BOP's enabling statute, extending a prisoner's sentence is beyond the BOP's statutory authority. The court held Zakiya was wrongfully held past his maximum release date of May 5, 1996. If Zakiya refuses to pay the fine after he is released from custody he can be resentenced. The court granted the habeas petition and ordered Zakiya's release from custody. See: *Zakiya v. Reno*, 52 F. Supp.2d 629 (ED VA 1999). ■

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# Citation Index

- Abu-Jamal v. Price*, 154 F.3d 128 (3rd Cir. 1998). 5:5  
*Alexander v. Hawk*, 159 F.3d 1323 (11th Cir. 1998). 6:18  
*Alnutt v. Cleary*, 27 F.Supp.2d 395 (WD NY 1998). 7:21  
*Amatel v. Reno*, 156 F.3d 192 (DC Cir. 1998). 9:17  
*Anderson v. Garner*, 22 F.Supp.2d 1379 (ND GA 1997). 4:9  
*Anyanwutaku v. Moore*, 151 F.3d 1053 (DC Cir. 1998). 4:24  
*Armstrong v. Squadrito*, 152 F.3d 564 (7th Cir. 1998). 4:15  
*Arroyo Lopez v. Nutall*, 25 F.Supp.2d 409 (SD NY 1998). 11:8  
*Arsberry v. State of Illinois*, USDC ND IL, 99-C-2457. 8:10  
*Ashelman v. Wawraszek*, Unpublished Settlement. 9:14  
*Ashley v. Dilworth*, 147 F.3d 715 (8th Cir. 1998). 3:13  
*Ayala v. Davis Co. Utah*, USDC D UT, 1-96-CV-00030C. 5:6  
*Ayers v. Ryan*, 152 F.3d 77 (2nd Cir. 1998). 4:16  
*Baker v. Willett*, 42 F.Supp.2d 192 (ND NY 1999). 11:25  
*Bankes v. Simmons*, 963 P.2d 412 (Kansas 1998). 3:20  
*Bass v. Perrin*, 170 F.3d 1312 (11th Cir. 1999). 9:28  
*Bass v. Singletary*, 143 F.3d 1442 (11th Cir. 1998). 2:22  
*Beeson v. Fishkill Corr. Facility*, 28 F.Supp.2d 884 (SD NY 1998). 9:18  
*Benjamin v. Jacobson*, 172 F.3d 144 (2nd Cir. 1999)(en banc). 8:24  
*Berry v. Oswalt*, 143 F.3d 1127 (8th Cir. 1998). 2:19  
*Berryman v. Rieger*, 150 F.3d 561 (6th Cir. 1998). 8:16  
*Bishop v. Lewis*, 155 F.3d 1094 (9th Cir. 1998). 4:8  
*Black v. Selksy*, 15 F.Supp.2d 311 (WD NY 1998). 5:23  
*Blair-Bey v. Quick*, 159 F.3d 591 (DC Cir. 1998). 4:24  
*Blas v. Endicott*, 31 F.Supp.2d 1131 (ED WI 1999). 8:26  
*Blaskiewicz v. County of Suffolk*, 29 F.Supp.2d 134 (ED NY 1998). 10:19  
*Blissett v. Casey*, 147 F.3d 218 (2nd Cir. 1998). 10:13  
*Bowen v. Crabtree*, 22 F.Supp.2d 1131 (D Or 1998). 8:20  
*Bradley v. Puckett*, 157 F.3d 1022 (5th Cir. 1998). 6:13  
*Byrd v. Crabtree*, 22 F.Supp.2d 1128 (D Or 1998). 8:20  
*Cagle v. Hutto*, 177 F.3d 253 (4th Cir. 1999). 11:22  
*Campbell v. Arkansas DOC*, 155 F.3d 950 (8th Cir. 1998). 9:7  
*Carillo v. DuBois*, 23 F.Supp.2d 103 (D Mass 1998). 7:15  
*Carr v. O'Leary*, 167 F.3d 1124 (7th Cir. 1999). 10:20  
*Castle v. Clymer*, 15 F.Supp.2d 640 (ED PA 1998). 10:11  
*Catalyst, et al v. Box Elder County, Utah, et al*, USDC D UT, 1-98CV-00130K. 3:8  
*Celske v. Edwards*, 164 F.3d 396 (7th Cir. 1999). 12:17  
*Chairs v. Burgess*, 25 F.Supp.2d 1333 (ND Ala. 1998). 10:23  
*Chandler v. D.C. Department of Corrections*, 145 F.3d 1355 (DC Cir. 1998). 1:8  
*Choyce v. Dominguez*, 160 F.3d 1068 (5th Cir. 1998). 5:10  
*Clarke v. Stalder*, 154 F.3d 186 (5th Cir. 1998)(en banc). 3:18  
*Cofer v. Schriro*, 176 F.3d 1082 (8th Cir. 1999). 12:25  
*Cohen v. U.S.*, 151 F.3d 1338 (11th Cir. 1998). 4:29  
*Commonwealth of Pennsylvania v. Franciscus*, 710 A.2d 1112 (Penn. 1998). 3:15  
*Cotton v. Fordice*, 157 F.3d 388 (5th Cir. 1998). 5:24  
*Cozine v. Crabtree*, 15 F.Supp.2d 997 (D Or 1998). 7:18  
*Craig v. Eberly*, 164 F.3d 490 (10th Cir. 1998). 7:11  
*Cunningham v. Eyman*, 11 F.Supp.2d 969 (ND IL 1998). 7:10  
*Daily v. Monte*, 26 F.Supp.2d 984 (ED Mich. 1998). 11:16  
*Daleure v. Kentucky*, USDC WD KY, Louisville Division, 3:97CV-709H. 8:10  
*Daniel v. Rolfs*, 29 F.Supp.2d 1184 (ED WA 1998). 7:23  
*Davis v. District of Columbia*, 158 F.3d 1342 (DC Cir. 1998). 9:16  
*Davis v. Dorsey*, 167 F.3d 411 (8th Cir. 1999). 8:21  
*Davis v. Fechtel*, 150 F.3d 486 (5th Cir. 1998). 7:10  
*Davis v. Kelly*, 160 F.3d 917 (2nd Cir. 1998). 7:19  
*Davis v. Woehrer*, 32 F.Supp.2d 1078 (ED WI 1999). 9:18  
*De Tie v. Orange County*, 152 F.3d 1109 (9th Cir. 1998). 5:25  
*Dean v. Lehman*, King County Superior Court, 97-2-12906-1SEA. 8:8  
*Dean v. Lehman*, WA Supreme Court, 68281-0. 9:14  
*DeJesus v. Peters*, USDC ED PA, 95-1005. 6:19  
*Denike v. Fauver*, 3 F.Supp.2d 540 (D NJ 1998). 1:5  
*Doe by and through Doe v. Washington County*, 150 F.3d 920 (8th Cir. 1998). 4:5  
*Doe v. Fauver*, 3 F.Supp.2d 485 (D.N.J. 1997). 2:26  
*Duffy v. Riveland*, C92-1596R & C93-637R (W.D. Wash.). 2:12  
*Earls v. Salt Lake County*, USDC D UT, 2-98-CV-521J. 10:14  
*Essex County Jail Annex Inmates v. Treffinger*, 18 F.Supp.2d 445 (D NJ 1998). 7:10  
*Estate of Henry Delgado v. Salt Lake County*, USDC D UT, 2-99-CV-39-B. 10:14  
*Estate of Preston Tate v. Gomez*, USDC ED CA, CV-F-95-5239-DLB. 5:18  
*Evans v. Deuth*, 8 F.Supp.2d 1135 (ND IN 1998). 4:25  
*Evans v. Illinois DOC*, 150 F.3d 810 (7th Cir. 1998). 3:13  
*Farmer v. Moritsugu*, 163 F.3d 610 (DC Cir. 1998). 7:21  
*Faver v. Bayh*, 689 N.E.2d 727 (Ind.Ct.App. 1997). 4:20  
*Fierro v. Terhune*, 147 F.3d 1158 (9th Cir. 1998). 2:13  
*Fischer v. Shaheen, et al*, Merrimack Superior Court Docket No. 98-E-402. 5:18  
*Fontroy v. Owens*, 150 F.3d 239 (3rd Cir. 1998). 8:13  
*Ford v. State*, 979 P.2d 10 (Ariz.App.Div.1, 1999). 12:15  
*Franklin v. District of Columbia*, 163 F.3d 625 (DC Cir. 1999). 8:17  
*Franklin v. District of Columbia, rehearing denied*, 168 F.3d 1360 (DC Cir. 1999). 8:17  
*Franklin v. Zaruba*, 150 F.3d 682 (7th Cir. 1998). 2:15  
*Freeman v. Lee*, 30 F.Supp.2d 52 (D DC 1998). 9:18  
*Friedland v. Fauver*, 6 F.Supp.2d 292 (D NJ 1998). 6:17  
*Fristoe v. Thompson*, 144 F.3d 627 (10th Cir. 1998). 1:9  
*Frost v. Agros*, 152 F.3d 1124 (9th Cir. 1998). 4:27  
*Gann v. Lytle*, USDC ED CA, CIV-S-95-0022LKK-JFM. 10:14  
*Garcia v. Pozzi*, USDC ED CA, CIV-S-95-0009-DADP. 4:16  
*Gärner v. Nelson*, 963 P.2d 1242 (Kan. App. 1998). 7:17  
*Garrett v. Clarke*, 147 F.3d 745 (8th Cir. 1998). 4:8  
*Gavis v. Crabtree*, 28 F.Supp.2d 1264 (D Or 1998). 8:20  
*Ghana v. Pierce*, 159 F.3d 1206 (9th Cir. 1998). 6:23  
*Giano v. Goord*, 9 F.Supp.2d 235 (WD NY 1998). 7:10  
*Gibbs v. Cross*, 160 F.3d 962 (3rd Cir. 1998). 6:18  
*Gibbs v. Ryan*, 160 F.3d 160 (3rd Cir. 1998). 9:18  
*Giron v. CCA*, 14 F.Supp.2d 1245 (D NM 1998). 7:14  
*Glover v. Johnson*, 35 F.Supp.2d 1010 (ED MI 1999). 10:15  
*Glover v. Johnson*, 9 F.Supp.2d 799 (ED MI 1998). 4:5  
*Gomez v. Chandler*, 163 F.3d 921 (5th Cir. 1999). 9:19  
*Gomez v. USAA Federal Savings Bank*, 171 F.3d 794 (2nd Cir. 1999). 8:23  
*Gonzales v. Wyatt*, 157 F.3d 1016 (5th Cir. 1998). 6:26  
*Gravely v. Madden*, 142 F.3d 345 (6th Cir. 1998). 3:17  
*Greig v. Goord*, 169 F.3d 165 (2nd Cir. 1999). 8:26  
*Gwynn v. TransCor America, Inc.*, 26 F.Supp.2d 1256 (D Colo. 1998). 10:15  
*Hadix v. Johnson*, 143 F.3d 246 (6th Cir. 1998). 2:6  
*Hall v. Stone*, 170 F.3d 706 (7th Cir. 1999). 8:27  
*Hallett v. Payne*, USDC WD WA, 93-5496. 9:1  
*Hamilton Plaintiffs v. Williams Plaintiffs*, 147 F.3d 367 (5th Cir. 1998). 4:20  
*Hanlon v. Berger*, 119 S.Ct. 1706 (1999). 9:15  
*Hansen v. Jorgensen*, USDC Utah, 91-CV-991. 1:11  
*Harsen v. Garratt*, 29 F.Supp.2d 272 (ED Va. 1998). 12:26  
*Harper v. Showers*, 174 F.3d 716 (5th Cir. 1999). 12:23  
*Harris v. Ford*, 32 F.Supp.2d 1109 (D AK 1999). 9:19

- Hawkins v. Comparet-Cassani*, 33 F.Supp.2d 1244 (CD CA 1999). 9:24
- Hawkins v. Freeman*, 166 F.3d 267 (4th Cir. 1999). 9:22
- Hawks v. Timms*, 35 F.Supp.2d 464 (D MD 1999). 9:23
- Heidelberg v. Illinois Prisoner Review Board*, 163 F.3d 1025 (7th Cir. 1998). 8:19
- Henderson v. Mazurkiewicz*, USDC MD PA, 4:CV-97-250. 9:13
- Herlein v. Higgins*, 172 F.3d 1089 (8th Cir. 1999). 8:22
- Hernandez v. Kalinowski*, 146 F.3d 196 (3rd Cir. 1998). 1:5
- Hicks v. Brooks*, 28 F.Supp.2d 1268 (D Colo 1998). 8:20
- Hines v. South Carolina DOC*, 148 F.3d 353 (4th Cir. 1998). 3:21
- Holliman v. DeTella*, 6 F.Supp. 2d 968 (ND IL 1998). 3:12
- Hudak v. Miller*, 28 F.Supp.2d 827 (SD NY 1998). 9:23
- Hudson v. McHugh*, 148 F.3d 859 (7th Cir. 1998). 2:18
- Huguenin v. Ponte*, 29 F.Supp.2d 57 (D RI 1998). 9:20
- Hyché v. Christensen*, 170 F.3d 769 (7th Cir. 1999). 8:27
- Imprisoned Citizens Union v. Ridge*, 169 F.3d 178 (2nd Cir. 1999). 8:24
- Imprisoned Citizens Union v. Shapp*, 11 F.Supp. 2d 586 (ED PA 1998). 3:13
- In Re Metcalf*, 963 P.2d 911, 92 Wn.App. 165 (WA App.Div.1, 1998). 2:11
- In Re Northeast Ohio Correctional Centers*, USDC ND OH, 4:97:CV-1995. 8:14
- In Re Sappenfield*, 964 P.2d 1204 (Wash. App. Div. I 1998). 7:19
- Inmates of D.C. Jail v. Johnson*, 158 F.3d 1357 (DC Cir. 1998). 11:28
- Inzunza-Ortega v. Superior Court*, 968 P.2d 631 (Ariz. App. Div. I 1998). 7:18
- Jackson v. DeTella*, 998 F.Supp. 901 (ND IL 1998). 3:12
- Jake v. Herschberger*, 173 F.3d 1059 (7th Cir. 1999). 10:22
- Jenkins v. Haulbert*, 179 F.3d 19 (2nd Cir. 1999). 11:21
- Jenkins v. Morton*, 148 F.3d 257 (3rd Cir. 1998). 3:12
- Jenkins v. Toombs*, 32 F.Supp.2d 955 (WD MI 1999). 9:18
- Jennings v. McCormick*, 154 F.3d 542 (5th Cir. 1998). 5:25
- Johnson v. Freeburn*, 29 F.Supp.2d 764 (ED MI 1998). 7:22
- Johnson v. Horn*, 150 F.3d 276 (3rd Cir. 1998). 8:15
- Jones v. Baker*, 155 F.3d 810 (6th Cir. 1998). 5:4
- Jones v. DeTella*, 12 F.Supp.2d 824 (ND IL 1998). 7:10
- Jones v. Garner*, 164 F.3d 589 (11th Cir. 1999). 10:21
- Kapshammer v. Boyd*, 5 F.Supp.2d 689 (ED WI 1998). 2:21
- Kesler v. King*, 29 F.Supp.2d 356 (SD Tex. 1998). 8:18
- Key v. Grayson*, 998 F.Supp. 793 (E.D. Mich. 1998). 2:22
- Key v. McKinney*, 176 F.3d 1083 (8th Cir. 1999). 12:17
- Klein v. Coblenz*, No. 96-1289 (10th Cir. 1998). 2:5
- Knight v. Vernon*, 23 F.Supp.2d 634 (MD NC 1998). 9:7
- Komar Company v. Singletary*, USDC SD FL, 98-14294-CIV-Davis. 6:15
- Lara v. Williams*, 986 SW2d 310 (Tex.App.-Fort Worth 1999). 8:21
- Larson v. Scott*, 157 F.3d 1030 (5th Cir. 1998). 4:8
- Lauro v. City of New York*, 39 F.Supp.2d 351 (SD NY 1999). 10:25
- Lawson v. Trowbridge*, 153 F.3d 368 (7th Cir. 1998). 6:16
- Lee v. Coughlin*, 26 F.Supp.2d 615 (SD NY 1998). 7:25
- Lefkovowitz v. Citi-Equity Group Inc.*, 146 F.3d 609 (8th Cir. 1998). 4:8
- Lentworth v. Traham*, 981 SW2d 720 (Tex.App. Houston 1st Dist. 1998). 7:20
- Lewis v. Cook Co. Dept. of Corrections*, 28 F.Supp.2d 1073 (ND IL 1998). 7:24
- Lewis v. Evans*, USDC SD GA, Savannah Division, CV484-251. 10:8
- Lewis v. Sheahan*, 35 F.Supp.2d 633 (ND IL 1999). 9:19
- Lockley v. New Jersey, Burlington County*, L03195-94. 11:5
- Lopez v. LeMaster*, 172 F.3d 756 (10th Cir. 1999). 11:20
- Lopez v. Smith*, 160 F.3d 567 (9th Cir. 1998). 4:9
- Luck v. Rovenstine*, 168 F.3d 323 (7th Cir. 1999). 11:10
- Mahotep v. DeLuca*, 3 F.Supp. 2d 385 (ND NY 1998). 3:25
- Mandela v. Campbell*, 978 S.W.2d 531 (Tenn. 1998). 9:12
- Martin v. Hadix*, 119 S.Ct. 1998 (1999). 10:12
- Martin v. Scott*, 156 F.3d 578 (5th Cir. 1998). 6:13
- Mason v. Schriro*, 45 F.Supp.2d 709 (WD MO 1999). 11:25
- Massey v. City of New York, et al.*, USDC SD NY, 97CIV-7607(LAP). 4:23
- Mauro v. Arpaio*, 147 F.3d 1137 (9th Cir. 1998). 2:25
- Mauro v. Arpaio*, 162 F.3d 547 (9th Cir. 1998). 4:24
- McClary v. Kelly*, 4 F.Supp. 2d 195 (WD NY 1998). 3:18
- McClendon v. City of Albuquerque*, 29 F.Supp.2d 1267 (D NM 1996). 9:18
- McLean v. Crabtree*, 173 F.3d 1176 (9th Cir. 1999). 10:25
- McNally v. Prison Health Services*, 46 F.Supp.2d 49 (D ME 1999). 12:19
- McNally v. Prison Health Services*, 52 F.Supp.2d 147 (D ME 1999). 12:19
- McNally v. Prison Health Services, Inc.*, 28 F.Supp.2d 671 (D ME 1998). 7:17
- McPherson v. Coombe*, 29 F.Supp.2d 141 (WD NY 1998). 9:17
- Miller v. New Jersey State DOC*, 145 F.3d 616 (3rd Cir. 1998). 1:12
- Miniken v. Walter*, 9th Cir. Case No. 97-35913, 97-36072. 3:17
- Montez v. Romer*, 32 F.Supp.2d 1235 (D Colo. 1999). 8:16
- Moore v. Carwell*, 168 F.3d 234 (5th Cir. 1999). 11:15
- Morales Feliciano v. Rossello Gonzalez*, 13 F.Supp.2d 151 (D. Puerto Rico 1998). 4:3
- Moss v. Speybroeck*, USDC, ND IN, Southbend Division, 3:97-CV-378RM. 2:23
- Muhammed v. U.S.*, 6 F.Supp.2d 582 (ND Tex. 1998). 4:22
- Murphy v. CMS, New Castle Co. Superior Court, DE*, 95C-07-148SCD. 6:13
- Murray v. Dosal*, 150 F.3d 814 (8th Cir. 1998). 4:8
- Nance v. Vierge*, 147 F.3d 589 (7th Cir. 1998). 4:18
- Nichols v. Hopper*, 173 F.3d 820 (11th Cir. 1999). 12:18
- Noble v. Board of Parole*, 327 Or. 485, 964 P.2d 990 (1998). 4:14
- Orr v. Hawk*, 156 F.3d 651 (6th Cir. 1998). 6:26
- Parrish v. Alabama DOC*, 156 F.3d 1128 (11th Cir. 1998). 8:29
- Pate v. Steven*, 163 F.3d 437 (7th Cir. 1998). 7:25
- Paul P. v. Verniero*, 170 F.3d 396 (3rd Cir. 1999). 11:9
- Peña v. U.S.*, 157 F.3d 984 (5th Cir. 1998). 6:26
- People v. Holmes*, 959 P.2d 406 (Colo. 1998). 2:23
- People v. Reyes*, 80 Cal.Rptr. 734, 968 P.2d 445 (Cal. 1998). 7:20
- Perkins v. Kansas Dept. of Corrections*, 165 F.3d 803 (10th Cir. 1999). 9:27
- Phillips v. State of South Carolina*, 504 So.2d 111 (South Carolina 1998). 4:15
- Powe v. Ennis*, 177 F.3d 393 (5th Cir. 1999). 12:22
- Prison Legal News v. Cook*, USDC Oregon, 98-1344MA. 1:6
- Prison Legal News v. Haley*, USDC MD AL, CV-99-S-486-N. 8:5
- Prison Legal News v. Ransom*, USDC ED MI, CV-99-70523AC. 4:4
- Prison Legal News v. Washington DOC*, USDC ED WA, CS-99-0231-WFN. 11:7
- Prisoners' Legal News v. Christensen*, USDC D UT, 2:99-CV-0149G. 8:15
- Quigley v. Atmore, et al*, USDC 95-1138-Civ-T-24E (M.D.Fla.). 2:14
- Ralston v. McGovern*, 167 F.3d 1160 (7th Cir. 1999). 8:20
- Ramos v. O'Connell*, 28 F.Supp.2d 796 (WD NY 1998). 7:15
- Rand v. Rowland*, 154 F.3d 952 (9th Cir. 1998)(en banc). 4:19
- Rapier v. Harris*, 172 F.3d 999 (7th Cir. 1999). 12:22
- Rizvi v. Crabtree*, 42 F.Supp.2d 1024 (D OR 1999). 11:24
- Roberson v. Brassell*, 29 F.Supp.2d 346 (SD Tex. 1998). 8:25
- Robinson v. Page*, 170 F.3d 747 (7th Cir. 1999). 8:26

*Rodriguez v. Cook*, 169 F.3d 1176 (9th Cir. 1999). 9:18  
*Rodriguez v. Zavaras*, 22 F.Supp.2d 1196 (D.Colo. 1997). 11:28  
*Rosales v. Coughlin*, 10 F.Supp.2d 261 (WD NY 1998). 4:29  
*Roucchio v. Coughlin*, 29 F.Supp.2d 72 (ED NY 1998). 7:22  
*Royce v. Hahn*, 151 F.3d 116 (3rd Cir. 1998). 4:25  
*Ruiz v. Estelle*, 161 F.3d 814 (5th Cir. 1998). 5:10  
*Ruiz v. Johnson*, 37 F.Supp.2d 855 (SD TX 1999). 6:1  
*Ruiz v. United States*, 160 F.3d 273 (5th Cir. 1998). 9:18  
*Samuels v. Mockry*, 142 F.3d 134 (2nd Cir. 1998). 2:10  
*Sanchez v. Taggart*, 144 F.3d 1154 (8th Cir. 1998). 1:9  
*Schneider v. California Dept. of Corrections*, 151 F.3d 1194 (9th Cir. 1998). 4:26  
*Scott v. Albury*, 156 F.3d 283 (2nd Cir. 1998). 2:11  
*Scotto v. Almenas*, 143 F.3d 105 (2nd Cir. 1998). 2:20  
*Sheppard v. Phoenix*, USDC 91-civ-4148 (RPP). 2:16  
*Shumate v. Wilson*, No Cite. 9:5  
*Sikes v. Gaytan*, USDC \_\_\_\_ TX Court no. 95-CA-1.300PMA. 8:13  
*Simmons v. Cook*, 154 F.3d 805 (8th Cir. 1998). 5:24  
*Simpson v. Horn*, 25 F.Supp.2d 563 (ED PA 1998). 10:21  
*Smith v. Brenoettsy*, 158 F.3d 908 (5th Cir. 1998). 7:16  
*Smith v. State of Washington*, Thurston County Superior Court, 98-2-01666-1. 8:9  
*Speedrack Products Group, Ltd.*, 325 NLRB 109 (1998). 3:23  
*Sperow v. Melvin*, 153 F.3d 781 (7th Cir. 1998). 5:25  
*Spicer v. Rossetti*, 150 F.3d 642 (7th Cir. 1998). 3:23  
*Sprau v. Coughlin*, 997 F.Supp. 390 (WDNY 1998). 2:9  
*Spruce v. Sargent*, 149 F.3d 783 (8th Cir. 1998). 3:22  
*Stansbury v. Hannigan*, 960 P.2d 227 (Kansas 1998). 3:20  
*State Bureau of Child Support Services v. Garcia*, 975 P.2d 793 (Idaho App. 1999). 11:24  
*State ex rel Anstey v. Davis*, 509 SE 2d 579, 203 W.Va. 538 (WV 1998). 11:22  
*State of NH v. Adams*, 159 F.3d 680 (1st Cir. 1998). 7:20  
*State v. Brown*, 977 P.2d 1242, 95 Wa.App. 952 (Wa.App.Div.3, 1999). 11:23  
*State v. Burmaster*, 979 P.2d 442 (Wash.App.Div. 1 1999). 12:24  
*State v. Cloud*, 95 Wn.App. 606, 976 P.2d 649 (Wa.App.Div. 1, 1999). 12:27  
*Stefanoff v. Hays County, Tex.*, 154 F.3d 523 (5th Cir. 1998). 4:21  
*Stetzen v. McKune*, No. 77,897 (Kansas Court of Appeals 9-5-97, unpub). 3:20  
*Stewart v. Murphy*, 174 F.3d 530 (5th Cir. 1999). 12:20  
*Swan v. Banks*, 160 F.3d 1258 (9th Cir. 1998). 4:9  
*Talley-Bey v. Knebl*, 168 F.3d 884 (6th Cir. 1999). 8:24  
*Taylor v. United States*, 181 F.3d 1017 (9th Cir. 1999)(en banc). 12:12  
*Taylor v. United States*, 162 F.3d 547 (9th Cir. 1998). 1:5  
*Thaddeus-X v. Blatter*, 175 F.3d 378 (6th Cir. 1999)(en banc). 11:18  
*Trobaugh v. Hall*, 176 F.3d 1087 (8th Cir. 1999). 12:26  
*Underwood v. Wilson*, 151 F.3d 292 (5th Cir. 1998). 2:7  
*United States v. Lucas*, 157 F.3d 998 (5th Cir. 1998). 8:12  
*United States v. Vahovick*, 160 F.3d 395 (7th Cir. 1998). 6:23  
*United States v. Walsh*, 27 F.Supp.2d 186 (WD NY 1998). 7:11  
*United States v. Felipe*, 148 F.3d 101 (2nd Cir. 1998). 3:21  
*United States v. Jeanes*, 150 F.3d 483 (5th Cir. 1998). 2:19  
*United States v. Thomas*, 155 F.3d 833 (7th Cir. 1998). 7:18  
*United States v. Whaley*, 148 F.3d 305 (2nd Cir. 1998). 4:21  
*Valona v. US Parole Com'n*, 165 F.3d 508 (7th Cir. 1998). 9:25  
*Vazquez v. Carver*, 18 F.Supp. 2d 503 (ED PA 1998). 3:13  
*VitaPro Foods v. Department of Criminal Justice*, 969 SW 2d 84 (Tex.App.-Texarkana 1998). 2:21  
*Walters v. Edgar*, 163 F.3d 430 (7th Cir. 1998). 9:25  
*Ware v. Jackson County, Mo.*, 150 F.3d 873 (8th Cir. 1998). 2:17  
*Warner v. Orange County Dept. of Probation*, 173 F.3d 120 (2nd Cir. 1999). 8:22

*Waterman v. Verniero*, 12 F.Supp.2d 364 (D NJ 1998)(preliminary injunction); 12 F.Supp.2d 378 (D NJ 1998)(permanent injunction). 5:21  
*Waugh v. Singletary*, USDC MD FL (Jacksonville), 95-605-CIV-J-20A. 3:15  
*Webber v. Crabtree*, 158 F.3d 460 (9th Cir. 1998). 6:22  
*Weicherding v. Riegel*, 160 F.3d 1139 (7th Cir. 1998). 5:7  
*Wendell v. Asher*, 162 F.3d 887 (5th Cir. 1998). 6:18  
*White v. Paulsen*, 997 F.Supp. 1380 (ED WA 1998). 3:5  
*White v. Phillips*, 34 F.Supp.2d 1038 (WD LA 1998). 8:25  
*White-Bey v. Missouri DOC*, 24th Judicial Circuit, Wash. Co., CV-1098-435cc. 7:8  
*Whitley v. Hunt*, 158 F.3d 882 (5th Cir. 1998). 6:19  
*Whitlock v. Johnson*, 153 F.3d 380 (7th Cir. 1998). 4:14  
*Williams v. Drake*, 146 F.3d 44 (1st Cir. 1998). 1:12  
*Williams v. Norris*, 148 F.3d 983 (8th Cir. 1998). 4:23  
*Williams v. Norris*, 176 F.3d 1089 (8th Cir. 1999). 12:25  
*Williams v. Price*, 25 F.Supp.2d 623 (WD PA 1998). 9:21  
*Williamson v. Gregoire*, 151 F.3d 1180 (9th Cir. 1998). 4:22  
*Wilson v. Blankenship*, 163 F.3d 1284 (11th Cir. 1998). 9:21  
*Wilson v. Lawrence Co., Missouri*, 154 F.3d 757 (8th Cir. 1998). 6:17  
*Wilson v. Layne*, 119 S.Ct. 1692 (1999). 9:15  
*Wray v. Clarke*, 151 F.3d 808 (8th Cir. 1998). 8:14  
*Wright v. Coughlin*, 31 F.Supp.2d 301 (WD NY 1998). 9:20  
*York v. Huerta-Garcia*, 36 F.Supp.2d 1231 (SD CA 1999). 11:17  
*Young v. Miller*, 144 F.3d 1298 (10th Cir. 1998). 3:13  
*Zamot v. County of Atlantic County*, USDC D NJ, Camden Vicinage, 97-CV-4220. 12:16  
*Zupan v. Brown*, 5 F.Supp.2d 792 (ND CA 1998). 2:26

## Washington Municipalities Liable for Attacks by Probationers

The Washington state Supreme Court held that municipalities have a duty to protect others from reasonably foreseeable harm resulting from the dangerous propensities of probationers and pretrial releasees under their supervision.

In 1990 Barry Krantz raped a 6 year old little girl while on Seattle Municipal Court probation for a lewd conduct conviction. He was also on pretrial release while awaiting trial on King County charges stemming from a sexually motivated burglary. At that time, he had a long history of sexual deviancy, including convictions in 1980, 1987 and 1989. He admitted to exposing himself to approximately 400 women.

A negligence action was brought on behalf of the girl against both the City of Seattle and King County, alleging negligent supervision of Krantz that proximately caused the rape. Both the City and County moved for summary judgment, arguing they had no duty to protect others from danger posed by Krantz. The trial court denied their motions and the Court of Appeals affirmed. *Hertog v. City of Seattle*, 943 P.2d 1153 (1997).

The Supreme Court concluded that its analysis was governed by its holding in *Taggart v. State*, 822 P.2d 243 (1982) where it held that state parole officers have a duty to protect others from reasonably foreseeable danger resulting from the dangerous propensities of parolees.

The Court ultimately held that both the City and County have a duty to control those persons under their supervision to protect others from foreseeable harm resulting from the probationers' or pretrial releasees' dangerous propensities. See. *Hertog, ex rel. S.A.H. v. City of Seattle*, 979 P.2d 400 (Wash. 1999). ■

# Legal News

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## California Guards Abuse Young Prisoners

by W. Wisely

In a developing investigation eerily reminiscent of the abuse, corruption, and cover-ups at Corcoran prison, California Youth Authority guards stand accused of beating, and setting up fights between, youthful offenders at Youth Correctional Facility (YCF) in Chino, California. A six-month investigation disclosed that guards slammed handcuffed prisoners into walls, shot them with 37 millimeter riot guns at close range during cell extractions, threw prisoners into strip cells with urine and feces on the floors, and forcibly injected the young men with

psychotropic medications so they would be easier to manage, according to the *Los Angeles Times*.

A report on the abuses was delivered to Gov. Gray Davis. In the report, state investigators described how guards "tested the readiness of [prisoners] to be returned to the mainline" by throwing them in with rival gang members or known enemies. Similar practices at Corcoran prison resulted in the shooting deaths of several prisoners. The trial of seven Corcoran guards for violating the civil rights of prisoners by setting up fights, shooting the prisoners, and covering up the corruption up is pending.

Prisoners at YCF, between 12 and 25 years old, tried to complain about the abuses using the facility's administrative grievance system. But, YCF staff and administrators refused to listen or investigate, and never forwarded the complaints up the chain of command as required by the department's regulations. The ongoing investigation at YCF will probably spread to other California Youth Authority prisons. Davis administration officials stated that one ranking administrator at YCF has been removed from his job as a result of the early findings of the investigation.

"You have essentially a hermetically sealed environment," a governor's spokesperson said on condition of anonymity. "If there's abuse, if the institution lacks integrity and if [the young prisoners] are being injured or mistreated and there's no way to illuminate it and stop it, then it has a frightening dimension. This is scary stuff." Gov. Davis gave inspector

general Steven White orders to thoroughly investigate and report the abuses at YCF. The Democrat governor said in a letter September 24, 1999, that the investigation "has yielded very serious findings that place the safety of both [young prisoners] and staff at risk." In that letter to Robert Presley, Secretary of the state's Youth and Adult Correctional Agency which oversees the Youth Authority, Davis ordered officials to take "swift action" to end the corruption and institute changes designed to stop it from reoccurring in the future.

Don Novey, president and rabid defender of the state's political powerful prison guards union, said he knew about the investigation, but was unaware of the details. "All I do is represent [guards]. I don't cause any of this. No one from management has talked to me," Novey claimed. Perhaps that's because no one in management acknowledged that there were any problems at the youth prison. Frank Alarcon, former director of the youth authority, said reports of abusive guards never "came to [his] attention." "I'd want to see all the facts before I react too strongly," Alarcon, now a top level administrator with the Florida juvenile justice system, said.

In August, the *Times* reported that Stanford University tested psychiatric drugs on dozens of teen prisoners in experiments the youth authority now concedes violated state law. [PLN, Dec. 99] In 1997, the agency and the university conducted research on the youthful offenders which the director said was

### Inside

From the Editor	3
Book Reviews	4
Mumia Abu-Jamal	6
Shootings at Virginia Supermax	8
PLRA Round-up	10
Washington Prison Slavery	12
Baraldini Goes Home	16
Israel Limits Torture	17
Arizona Jail Settlement	20
New Jersey Porn Ban Upheld	23
NY Parole Commissioner Convicted	24
Indigence Cause to Retax Costs	27
News in Brief	28

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*PLN* is online with a newly designed web site. Point your browser to <http://www.prisonlegalnews.org> to see the start of the *PLN* legal research site. If there are any questions or comments about the web page drop us a line or email him at [webmaster@prisonlegalnews.org](mailto:webmaster@prisonlegalnews.org).

## **CA Abuse (continued)**

"not in compliance" with a statute barring medical testing on people in prison.

White, a former Sacramento County prosecutor, sent agents to YCF last April to investigate reports of the use of excessive force. The investigators were swarmed by staff and prisoners alike who told them horror stories of abuse. In their report, investigators described the "Friday night fights" set up by guards in the youth prison's notorious O and R Building. O and R is used as the hole, or security housing unit, at YCF. Young prisoners are locked in old, dark cells 23-1/2 hours a day for months at a time in O and R. The fights were arranged by guards to test whether prisoners were ready to be released back into the general population.

These tests consisted of two rival gang members or known enemies being placed in the same small room, cuffs removed, and watched for ten to fifteen minutes. At least a quarter of the time, fights broke out, and guards used pepper spray and riot guns to stop them. Hundreds of young men were involved in the incidents. The guards knew which prisoners were guaranteed to fight each other, and set the test up anticipating entertainment, according to the investigators. "In many of these cases, it's virtually a 100% certainty [a fight would happen] because if you put a Crip and Blood together they are going to fight," said an administration official who is familiar with the probe and status report. Davis ordered Presley to "immediately discontinue" the practice.

Even by CYA official estimates, at least 10% of the young offenders housed in YCF's O and R Building have serious mental health problems with "open ended drug prescriptions," the official disclosed. When a mentally ill prisoner acted out, investigators found, guards forcibly restrained and injected them with powerful psychiatric drugs. In other cases, guards forced teenagers to sit naked in a stripped cell for 24 hours. Guards often handcuffed prisoners, led them to blind spots out of the range of video cameras, and "slammed" them face first into walls or onto the floor.

Michael Bustamante, Gov. Davis' press secretary, said, "The findings that have been uncovered by the inspector

general are very disturbing, and it appears that some of these problems have been going on for some time." Those of us who spent most of our youth in such gulags already knew that. The question is, now that some of the abuse has been revealed, it remains to be seen whether, once the media attention wanes, the push for permanent reform does, too. ■

## **GA Prisoner Wins \$60,000 Retaliation Verdict**

On September 30, 1999, U.S. district court judge Orinda Evans awarded Georgia state prisoner Ray Yelverton \$60,000 in compensatory and punitive damages in a retaliation suit against prison officials. Yelverton was convicted of child molestation charges in 1990. He was imprisoned at the Ware State Prison in Waycross where he headed the Prisoner Liaison Committee. In 1993 Benjamin Johnson became warden of the prison and decided to reduce prisoner involvement in prison affairs. Yelverton objected and continued to press the committee's concerns on behalf of the prisoner population.

Johnson's response was to change Yelverton's job assignment from electrician to manual laborer. Johnson then ordered Yelverton transferred to the Georgia State Prison in Reidsville where he spent the next 19 months in solitary confinement. Yelverton filed suit, claiming the job demotion, transfer and prolonged isolation violated his first amendment rights.

The court agreed and ruled that Johnson had improperly retaliated against Yelverton for exercising his First amendment rights. The court awarded Yelverton \$35,000 in compensatory damages for mental anguish and suffering and \$25,000 in punitive damages. Five days before the court returned its verdict, on September 26, 1999, Johnson, 56, died of a heart attack.

John Watkins, of the Long, Aldridge and Watkins law firm, was appointed by the court to represent Yelverton. Watkins said "We are very pleased with the result. These cases are very difficult to win, but we felt the evidence was strong." The court has not yet awarded attorney fees. News accounts did not say if the case was tried before a jury or a judge. ■

Source: *Atlanta Constitution Journal*

## From the Editor

by Paul Wright

*PLN*'s fundraiser to pay for the second staff position has raised \$5,645 as of January 10, 2000. We need to raise a total of \$24,000 above and beyond what we normally bring in so we will be able to pay for a much needed second office person. If you haven't made a donation yet, it's not too late to do so. We especially appreciate the small donations made by prisoners, especially those on death row and in control units—every little bit helps. The Sonya Staff Foundation in New York has donated \$2,500 to our efforts for which we are very grateful. I would also like to thank those readers who, unable to make an additional donation, took the opportunity to extend their subscriptions.

I would like to thank those readers who returned the reader survey forms. Your responses give me invaluable feedback on how *PLN* can better serve your needs. In a few issues, once more of the surveys have been returned, I'll report the major trends. If you have not yet returned your survey form, it isn't too late to do so.

The most common response so far, especially from prisoners, is that they want more news from their state. In the course of a year *PLN* reports news from almost every state. *PLN* is financially limited in the number of pages we can print which means we have to prioritize the news we cover. However, a lot of the news we run depends on what you, our readers, send us. Most prison and jail news never makes the national media. It is solely reported at the local level, if at all.

A large part of our news coverage relies on our readers to send us newspaper clippings, administrative rulings, unpublished court opinions and settlements, and eyewitness accounts on what is happening in local prisons and jails. Then, once we have the material I have to decide what we will cover in *PLN*. The factors I consider in making this decision include: does it impact large numbers of prisoners, their families or supporters, is it of interest to national audience, are there enough facts available for a good story, can *PLN* add a new or different insight to the issue, is it receiving extensive coverage elsewhere, how many readers does

*PLN* have in that state which will be interested by this, etc. So keep sending *PLN* your news, newspaper and magazine articles, story ideas, tips and unpublished court rulings and settlements. We also welcome article submissions from our readers. If you would like to see a story or issue covered in *PLN* contact our office in Seattle for a copy of *PLN*'s writer guidelines (send an SASE). *PLN* can't afford to pay for articles, yet, but we will give you a free subscription if we use your submission.

Also, I am looking for volunteers who are willing to do internet information searches, mainly of newspaper web sites, on behalf of *PLN* so we can develop various news stories. If anyone wants to volunteer for this please contact me directly at the address on page two. If you have Westlaw or Lexis-Nexis access so much the better.

Enjoy this issue of *PLN* and please encourage others to subscribe. If you need *PLN* subscription flyers or a bundle of *PLN*'s to distribute at events send \$4 to *PLN*'s office, stamps are fine, and we will send you a bundle of *PLN*s and flyers. ■

## Secret Tools for Post-Conviction Relief, 1999

Edition, by Joe Allan Bounds.

**"The Research Reference Book for Lawyers and Post-conviction Litigants for Prevailing on Ineffective Assistance of Counsel claims and, Methods of Establishing 'Cause' for Procedural Default."** The Table of Contents has over 500 quick reference topics with favorable supporting federal case law. This book covers claims of Ineffective Assistance of Counsel, Conflict of Interest, Actual Innocence and much more!

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## Reviews

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### **Legal Research: How to Find and Understand the Law, 7th Edition**

by Stephen Elias and Susan Levinkind, Nolo Press, 392 pages.  
*Reviewed by Allan Parmelee*

Have you ever wondered what the difference is between a brief and a memorandum of law? Feel intimidated by the "stuff" in a court rules book or a law library? I wish I had had this book when I got started doing pro se litigation. The good news is that now it's here.

The very latest text in explaining legal research and what it consists of and how to do it, it carefully explains what a statute, cite, digest, legal encyclopedia or practice book is. This book has it all, including a great chapter on internet legal research.

What do you do when you enter a law library? *Legal Research* provides detailed "how to" steps from the beginning to the end of your law subject. For example, do you want to know if you have a valid constitutional law claim to sue a jail or police officer? Or what grounds you can challenge a criminal conviction on? By following this well written, easy to use, step by step legal research method you will know. Don't pay a lawyer or lose a valid claim when *Legal Research* can show you how to easily research it yourself.

Lawyers get paid the big bucks because they go to law school for three years to learn how the legal system works. *Legal Research* lifts the secrecy from legal writing and understanding how to write a brief and most importantly, how to do research to understand what the law on a given topic is and what it actually means.

*Legal Research* is invaluable to the lay person learning how to do legal research as well as more advanced litigators. It uses pictures and illustrations to show what a case citation like 42 F.3d 387 (7th Cir. 1994) means. In 13 chapters and two appendixes, the authors clearly cover every phase of legal research, from dusty old books to the internet, they

cover it all. Most importantly, the book includes research exercises so that readers can put their new found skills to use and determine if they can actually do the research the book has told them about. Anyone who reads this book will walk away with a clear understanding of what is in a law library and, most importantly, how to effectively use it.

*Legal Research* is a must for those who either can't get counsel to represent them or who wish to represent themselves in court. Even if you have counsel, this will provide you with the means and ability to do legal research on your own and gain an understanding of your own legal issues. With this book you can spend your time writing winning court pleadings. This is a must for any law library as well as the bookshelf of any pro se litigant. Cost is \$24.95, plus \$3.20 priority mail shipping. Order from: PLN, 2400 N.W. 80th St. PMB 148, Seattle, WA 98117.

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### **Finding the Right Lawyer**

by Jay Isenberg, American Bar Association, 256 pages

*Reviewed by Allan Parmelee*

Clear and to the point, while easy to understand. In *Finding the Right Lawyer*, the author presents one of the most concise, detailed and powerful presentations of a checklist of what to look for in a lawyer and how to find it. For example, the use of free sources, yellow pages, referrals, the Martindale-Hubbel Law Directory, etc., are all unmistakable methods to find the lawyer right for you. The Martindale Hubbel directory only lists about 30% of the nation's lawyers, the ones who are "A" rated on an A, B, C scale. The author explains why about 60% of the people who call a lawyer referral service either don't need a lawyer or cannot afford one. He also strongly explains why people should not represent themselves pro se or go small claims.

While this book was written in 1995, its underlying message is timeless. The internet is emerging as a good place to find legal counsel, which this book only

briefly mentions. The lack of more internet information is its only drawback. The book also discusses attorney fees, contingency cases, costs and much more. I bought this book myself in 1996 and I am as excited about it today as I was four years ago. It is a must buy if you are contemplating hiring an attorney or seeking counsel on a contingency or pro bono basis. Highly recommended. The many listed resources are worth the price alone. Cost is \$19.95. Order from: PLN, 2400 N.W. 80th St. PMB 148, Seattle, WA 98117. Add \$3.20 priority mail shipping.

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### **Prisoners' Guerrilla Handbook to Correspondence Programs in the U.S. and Canada: High School, Vocational, Paralegal and College Courses**

by Jon Marc Taylor, Audenreed Press, 243 Pages

*Reviewed by Paul Wright.*

The steady demise of educational programs in prison means that prisoners seeking an education can no longer rely on prisonrats to provide it. While there are books on the market discussing correspondence courses, they are all aimed at non prisoners.

*Prisoners' Guerrilla Handbook to Correspondence Programs in the U.S. and Canada* is written by Missouri prisoner Jon Marc Taylor who has successfully completed B.S. and M.A. degrees by mail while imprisoned. This book offers a complete description of 212 programs that are ideal for prisoners seeking to earn high school diplomas, associate, baccalaureate and graduate degrees and vocational certificates. In addition to giving contact information for each school, Taylor includes tuition rates, text book costs, courses offered, transfer credits, time limits for completing course, whether the school is accredited, and if so by whom, and much, much more.

Taylor also explains factors to be considered in selecting an educational program and how to make meaningful

comparisons between the courses offered for the tuition charged. No money to pay for school? Taylor covers that too. Any prisoner seeking to begin or continue their education behind bars will find this to be an invaluable road map. Cost is \$21.95, plus \$2 shipping. Contact: Audenreed Press, PMB 103, P.O. Box 1305, Brunswick, ME 04011. 1-888-315-0582.

\* \* \*

## **Voices From Within the Prison Walls**

by D.A. Shelton, News and Letters, 71 pages  
**Reviewed by Rick Card**

"Criminals have become the 'bogeyman' so that corporate America can continue to commit atrocities against the proletariat throughout the nation and around the world," says David Shelton in *Voices From Within the Prison Walls*. In a book that covers the breadth of our nation's massive prison explosion, Shelton delivers a concise and lively look behind the walls.

By explaining the characteristics of who is really rotting behind bars in our nation, Shelton unsheathes a fact that lawmakers and enforcers would rather remain hidden. While demonstrating that minorities are imprisoned disproportionately, an article of virtual common knowledge, Shelton doesn't stop there. He points out that economic conditions are also a huge factor, and specifies that in 1994 79% of those imprisoned lived in poverty and 67% were unemployed at the time of their arrest.

Another factor often missed by writers reporting on the prison industrial complex is the educational status of those imprisoned. Shelton points out that 40% of prisoners are unable to read or write and that 73% never completed high school. If illiteracy is a characteristic of those incarcerated, the continuing deterioration of our public schools is bound to create another round of explosive prison growth.

David Shelton is an Iowa State prisoner and *PLN* subscriber who uses the voices of prisoners to take us on a guided tour of the wretched conditions of confinement. Along the way he manages to

dispel some popular myths. For example, the media often portray prisoners as litigious people. However, Shelton exposes this fable by showing that in 1992 prisoners filed only 1 civil lawsuit for every 33 prisoners, while civilians filed lawsuits at nearly double that rate.

The book addresses a litany of inhumane prison conditions, including sexual abuse of women prisoners, brutality, control units, and the death penalty. Surprisingly, considering the brevity of the book itself, the author managed to leave few stones unturned.

Despite the wealth of information contained in *Voices From Within the Prison Walls*, Shelton's real purpose is a call to action by prisoners in the name of Marxist-Humanist ideology. Using the vast and sweeping oppression endured by prisoners, Shelton condemns capitalism and points us all toward the revolutionary light of socialism—presented as the path to liberation and equality.

It isn't clear in this writer's mind whether socialism is the answer to our nation's crisis of confinement, but it is clear that Shelton has powerful ideas for changing the collective minds of prisoners about what it means to struggle. That by itself sets this work apart from others.

The book is available from News and Letters, 36 S. Wabash, rm. 1440, Chicago, IL, 60603. The price is \$5, which includes postage. News and Notes also publishes a newspaper which is available upon request.

\* \* \*

## **Federal Criminal Defendant's Handbook: Negotiating the Long, Lonely Road from Arrest, to Prison, to Freedom**

by Douglas Hill, J.D., Kensington Publishers, 208 pages  
**Reviewed by Paul Wright.**

A common refrain among jailhouse lawyers that have successfully learned how to navigate the legal system while imprisoned is "I wish I knew at the time of my arrest what I know now." Knowledge of how the criminal justice system works in the real world is invaluable to anyone facing criminal charges.

Douglas Hill practiced law in California for 25 years before going to federal prison for six years after fighting criminal charges against him for five years. Now released from prison, Hill has written the *Federal Criminal Defendant's Handbook*. While primarily aimed at those who are dealing with the federal government, its general advice will be useful to anyone facing criminal charges in state court as well as federal court.

Hill provides criminal defendants with honest, down to earth information about the criminal justice system that is realistic and tells it like it is. While people that have previously had no dealings with the criminal justice system will probably benefit the most from this book, those that have been through the system before and haven't quite figured it out will also benefit.

Divided into three sections, Hill covers everything from arrest, indictment, to trial, prison and release. He explains the importance of finding the right lawyer and assessing the evidence against you in deciding whether to go to trial or make a plea agreement. For most people, these are the most important decisions they will make in their lives but there is surprisingly little information available on the topic. Criminal defendants generally have to rely on, and trust, the advice their lawyers give them. Anyone who reads this book will be in a much better position to critically assess the advice their lawyer gives them, as well as knowing what questions to ask their attorney.

Hill then tells people going to prison what they can do to influence their prison placement with the Bureau of Prisons (BOP), post conviction relief and what arrangements to make to put family, legal, business and other affairs into order before they go to prison. This information is especially useful since Hill gives real world advice to people going to prison. A lack of planning usually results in criminal defendants losing all their worldly possessions when they go to prison.

The *Federal Criminal Defendant's Handbook* gives an overview of the BOP, what spouses can do to support their imprisoned loved one, an excellent primer on what to expect in prison and how to constructively use your time while locked up.

The book concludes with chapters on halfway houses, parole, probation and

## Reviews (continued)

supervised release. All told, this is the best book on this issue that I've read to date. The insights that Hill offers are practical and invaluable. Anyone facing the prospect of being a criminal defendant and/or going to prison, especially federal prison, will find this book to be a useful and worthwhile investment. I wish I had had it when I was first arrested in 1987. Cost is \$44.95, plus \$3 shipping. Order from: Kensington Publishers, 1563 Solano Ave. PMB 533, Berkeley, CA 94707. (510) 524-7729.

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### **Enemies of the State: A Frank Discussion of Past Political Movements, Victories and Errors and the Current Political Climate for Revolutionary Struggle Within the USA**

by RNB with Marilyn Buck,  
David Gilbert and Laura  
Whitehorn, 84 Pages  
*Review by Paul Wright*

The United States government steadfastly denies holding any political prisoners. In reality, it holds over 100 leftist political prisoners imprisoned because of their anti-imperialist activities and beliefs. This booklet contains interviews with three of these prisoners of war. David Gilbert was a founding member of Students for a Democratic Society (SDS) and Weather Underground Organization (WUO). Marilyn Buck was a member of the Black Liberation Army (BLA) and Laura Whitehorn (*PLN*'s former columnist, now out of prison), was also a WUO member. All three were convicted and imprisoned for politically motivated "crimes" against the US government.

These detailed interviews allow each of these long time activists to discuss issues of armed struggle, their development and growth as political activists, and criticism and self criticism of the errors that were made in developing and building a resistance movement in the U.S. Candid and thoughtful, these interviews provide

a crucial and frequently hidden history of political resistance in America.

Labeled as "terrorists" by the US government, the booklet humanizes the interviewees and allows them to explain and express themselves as to why they saw armed action as a legitimate and necessary response to the genocidal policies of the US government in South East Asia and racism and police repression at home in the US.

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## A Matter of Law

by Mumia Abu-Jamal

*"Law is simply politics by other means..."*

— David Kairys, *Legal Reasoning*

When one looks at public projections of police in the corporate and entertainment media, one thinks of someone who is sworn to follow (as opposed to breaking) the "law." Similarly, when one examines the public projections of criminals in the corporate and entertainment media, the reverse image is received: to be one who breaks the law, is to be seen as a base, low individual.

But, as many of us have learned over the years, images are not reality; and public media projections often bear little resemblance to the truth.

Consider the case of two Pennsylvania State Troopers (Rodney Smith and Robert Johnson) both of whom were charged with committing crimes, and subsequently dismissed from the force. Once they were formally dismissed, they promptly filed grievances to an arbitrator, had their dismissals reversed and were reinstated. Now understand: one of these cops took his state issued pistol and stuck it in the mouth of Tammy Mathis, an ex-girlfriend, and threatened to kill her. Continuing to drink, he drove away, was soon arrested, and was charged with driving under the influence, simple assault and making terroristic threats. Johnson was caught stealing \$27.58 worth of merchandise from the Clover department store.

Citing a state statute called Act 111, the Pennsylvania supreme court accepted an allocatur appeal from the state to determine whether the arbitrator's award would stand.

Anyone interested in political prisoners in the US, modern American history and armed struggle in the US will find this booklet interesting and informative. The prisoners also discuss prison issues, struggle and organizing once they are in prison. Copies of the booklet are \$6.00 each. Order from: Resistance in Brooklyn, 309 Park Place, Brooklyn, NY 11238.

In a set of divided opinions known as *Pennsylvania State Police v. Pennsylvania State Troopers Association (Smith)*, the court determined that their authority was limited on review. Under what they termed "narrow scope", a majority of the justices decided that "the legislature dictated a restraint on judicial activity" in the area of grievances and arbitrations from police appeals, and that Act 111, "[forbade] appeals from an arbitration award." In the name of avoiding prolonged periods of litigation, and supporting equality between labor and management, the court upheld the arbitrator's awards, and ruled that the two state troopers charged in criminal conduct were entitled to their jobs, although, in accordance to the arbitrator's terms, they couldn't get back pay. Cases such as this reveal not just the limits of judicial power, but how powerful police really are. Men who have committed felonies are stopping, citing, and arresting people for traffic violations and other offenses. How can this be justified? The "law" justifies it. Or, as the saying goes, "The law is what judges say the law is."

When a so-called citizen crosses the barriers imposed by the law, that person loses his job and his freedom. When a cop violates that selfsame law, he keeps his job and his freedom! When cases such as this arise, how can the incarceration of countless youth, men and women in American prisons and jails be justified? It can't be.

For those who serve the system, crimes are just minor inconveniences. For those who don't, crimes are invitations to hell. Thus we learn the true nature of American justice! ■

# Habeas Challenging Transfer to Private Prison Dismissed

The court of appeals for the Seventh circuit held that habeas corpus was not the proper means to challenge a state statute allowing states to confine their prisoners in private prisons in other states. The court also held that a lawsuit challenging prisoners' confinement in private prisons in other states is frivolous.

Several Wisconsin state prisoners filed habeas corpus petitions in federal court challenging the constitutionality of Wis.Stat. Ann. § 301.21(2m). This law authorizes Wisconsin prison officials to contract the captivity of Wisconsin prisoners to private prisons in other states. As previously reported in *PLN*, Wisconsin has over 4,000 of its prisoners being held in private prisons operated by Corrections Corporation of America (CCA) in Tennessee and Oklahoma. [*PLN*, Mar. 1999] The petitioners claimed that § 301.21(2m) violates the Thirteenth amendment to the US constitution. The district court dismissed the habeas petition. The appeals court affirmed.

As a preliminary matter, the court of appeals held that 42 U.S.C. § 1983, not habeas corpus, is the proper means by which to challenge a state statute. Simply put, habeas can be used only if a prisoner is seeking to "get out" of custody in a meaningful sense." Habeas cannot, as a general rule, be used to challenge transfers between prisons.

Having concluded the challenge should have been brought as a section 1983 action, the court held dismissal of the habeas petitions was the proper course of action, as opposed to converting the petitions into § 1983 actions. The prisoners would therefore be free to refile the case as a section 1983 suit. The court held it would have been improper for the district court to simply convert the petitions itself.

Turning to the merits, the court advised the prisoners not to refile the petitions as § 1983 actions. Because "... they would be foolish to do so. They will merely waste their money and earn a strike. The claims are thoroughly frivolous. The Thirteenth amendment, which forbids involuntary servitude, has an express exception for persons imprisoned

pursuant to conviction for crime. Nor are we pointed to or can we think of any other provision of the constitution that might be violated by the decision of a state to confine a convicted prisoner in a prison owned by a private firm rather than by a government. A number of cases assume the propriety of such confinements, ... and to our knowledge no judge has opined to the contrary.... A prisoner has a legally protected interest in the conduct of his keeper, but not in the keeper's identity .... Let Wisconsin prisoners have no doubt of the complete lack of merit of their

Thirteenth amendment claims." See: *Pischke v. Litscher*, 178 F.3d 497 (7th Cir. 1999).

Prisoners faced with the prospect of out of state exile in private prisons far from their communities will, as the court notes above, have no legal remedy or recourse in the courts. To change these practices will require organizing and activism on behalf of the prisoners themselves and their families and supports. Under the Thirteenth amendment prisoners are, and remain, slave chattel of the state to be managed as the state sees fit. ■

## Amended Arizona Statute of Limitations Not Retroactive

The court of appeals for the Ninth circuit held that an Arizona statutory amendment eliminating the tolling provision for prisoners' suits, did not apply retroactively.

Christian Weaver TwoRivers, an Arizona prisoner, appealed a lower court's dismissal of his 42 U.S.C. § 1983 claim under Rule 12(b)(6) of the Federal Rules of Civil Procedure on the grounds that he failed to file suit within the applicable two year statute of limitations. "A provision under Arizona law which tolled the two year limitations for Arizona prisoners until after discovery of the prisoner's right to sue existed at the time TwoRivers discovered his right to bring his § 1983 action. However, before TwoRivers filed suit, Arizona amended its law deleting this grace period and requiring prisoners to bring their action within two years from the date of accrual."

Section 1983 does not contain its own statute of limitations. The federal courts borrow the statute of limitations applicable to personal injury claims in the forum state. See: *Wilson v. Garcia*, 471 U.S. 261, 105 S.Ct. 1938 (1985). In Arizona, the courts apply a two year statute of limitations to § 1983 claims. See: *Marks v. Parra*, 785 F.2d 1419 (9th Cir. 1986). In actions such as TwoRivers, the federal courts also borrow the forum state's tolling provisions. See: *Hardin v. Straub*, 490 U.S. 536, 109 S.Ct. 1998 (1989).

Under former A.R.S. § 12-502, prisoners were entitled to tolling until the prisoner knew or had reason to know that he or she had a right to file suit. "By contrast, the amended A.R.S. § 12-502 deletes this provision for prisoners and subjects them to the same rules as most other § 1983 plaintiffs."

Though the original incident of medical deliberate indifference occurred on September 14, 1994, TwoRivers filed within two years of October 26, 1994, "the date that he learned of his right to bring suit, and thus within the two year limitations of the former law in effect at the time.

The state, however, tried to say that the amended version of A.R.S. § 12-502 applied to TwoRivers and the clock should have begun to run on September 14, 1994. That would mean that TwoRivers' suit was time barred under the two year limitation.

The appeals court concluded that the district court erred by applying the amended A.R.S. § 12-502 retroactively to TwoRivers' case and dismissing his claims as time barred. Accordingly, TwoRivers filed suit within the two year limitations period for § 1983 claims in Arizona. The case was reversed and remanded back to the district court for further proceedings on the merits of TwoRivers' § 1983 claim. See: *TwoRivers v. Lewis*, 174 F.3d 987 (9th Cir. 1999). ■

# Abuse of Force at Virginia's Supermax

## Shoot 'Em if They Step Out of Line

by Dan Pens

Shortly after publication of the July *PLN*, cover article: "Strip Mining Human Rights in Virginia's Supermax Dungeons", *PLN* received a letter from a prisoner at Red Onion, one of Virginia's two new "supermax" prisons. "You wouldn't believe it," he wrote, "there's lines painted on the floor and these hillbillies [guards] actually shoot people for stepping out of line!"

He was right. It sounded unbelievable. However, other Red Onion prisoners wrote similar accounts to *PLN*. And corroborating accounts came from human Rights Watch in New York.

In its June 30, 1999 report, "Human Rights Watch Statement to the Virginia Crime Commission: Super-Maximum Security Confinement in Virginia" (available on the web at: [www.hrw.org/press/1999/jul/paper](http://www.hrw.org/press/1999/jul/paper)) is a quote from a Red Onion prisoner describing why guards fire their weapons: "for a simple fist fight that two officers could easily break up, for not walking fast enough... for stepping over a red line that leads to their cell, for not hanging up the inmate phone quick enough, for not coming out of the showers quick enough, for not eating our meals fast enough, for not sitting with who the officers instruct you to sit with in the dining hall, for refusing to roll your pants leg down when instructed, etc. The officers don't talk to the inmates, they just shoot the shotguns off, and sit there all day with the shotguns pointed at us."

Then *PLN* obtained copies of several Virginia DOC memos that provided the proverbial (and in this case, perhaps literal) "smoking gun." [See side bar on page 9.]

A typical shooting incident was reported in detail by Frank Green, reporter for the *Richmond Times-Dispatch*. Kudos to Mr. Green for presenting both the "official" VDOC version of the event along with eyewitness accounts from several prisoners.

The incident took place at 7:30 a.m. August 8 in Red Onion's chow hall when two prisoners engaged in a minor tussle.

"A gun post officer issued a verbal command to the inmates," VDOC PR lackey Larry Traylor told the

*Times-Dispatch*. "The inmates ignored all verbal warnings and initial warning shot. The gun post officer then fired the first stinger round at the lower extremities of the two fighting inmates. This process was repeated until the inmates complied with the orders and stopped fighting."

According to Traylor, a warning was given before each shot was fired. He said one prisoner was taken to a hospital for treatment and was sent back to the prison. The wounds were described as not serious.

But contrast that sterilized version with the accounts sent to the *Times-Dispatch* by prisoners. Eric Williams, who was nearby and said he was shot four times, said "the officer in question was not at her post (facing our dining hall) when the scuffle began."

"She had to be advised by the duty sergeant who screamed up to her for assistance. When she recognized what was happening, she did not fire a warning shot or order inmates in the immediate area to disperse," Williams wrote. "Panic-stricken, she began to fire her weapon indiscriminately in the area where two inmates were scuffling. I was on the floor approximately 30 feet from the aforesaid incident, I took direct hits to my left arm and left foot. Two rounds on each. This officer fired at least eighteen to twenty rounds."

Another prisoner, Ashaun Ra, wrote that the panicked guard "fired over 20 shots ... down on top of the heads of the two inmates." One prisoner, he says, "was hit 18 times. Five times in the head, losing a tooth, and 13 times in the body."

Williams also wrote that, "one of these inmates, whose name I do not know, was hit 18 times by these pellet shots. Five of these shots hit him in the head. He had to be rushed to a local hospital because he was losing consciousness as a result of loss of blood. The back of his head looked like a tomato."

The August 8 mess hall shooting marked the end of Red Onion's first year of operation. According to the VDOC, 106 warning shots have been fired, 63 prisoners have been targets of the gunfire, about 28 prisoners have been examined

or treated for wounds at Red Onion, while three have been sent to an outside hospital for treatment. But prisoners writing to *PLN* say those figures grossly understate both the number of shootings and the incidence of injuries. The VDOC has so far refused to allow human rights monitors to review its use of force incident reports.

VDOC Director Ron Angelone, whom many consider a dangerous iron-fisted tyrant, is responsible for introducing firearms into Virginia's prisons. The VDOC's "shoot 'em if they step out of line" abuse of force policy is Angelone's creation. Angelone was sued for initiating similar shooting policies when he oversaw the Nevada prison system. [*PLN*, Jul.94]

### The Worst of the Worst

Angelone is fond of proclaiming that Virginia's supermaxes are necessary to house the most dangerous and predatory prisoners, the so-called worst of the worst.

But in reality, just about any prisoner can be exiled to Red Onion (and its virtual twin, Wallens Ridge state prison, both located in rural southwest Virginia). According to information obtained by Human Rights Watch, only 211 of Red Onion's 1,500 prisoners were assigned there because they had engaged in assaults in the previous 24 months. Another 45 Red Onion prisoners were sent there because of a "recent pattern of poor institutional adjustment." VDOC has stated that 92 prisoners were assigned to Red Onion because of their "need to establish stable adjustment."

What kind of prisoner needs to establish a stable adjustment? And why would he need to be shipped down state to a virtual human target-shooting gallery to find it? The case of Johnnie Lewis Wood provides an illuminating example.

Wood, 35, was serving 2 years, 3 months for driving on a suspended license, evading and eluding police, and possession of a trace of cocaine. Hardly your typical "dangerous violent predator." He was doing time at the Coffeewood Correctional Center when Ron Angelone and the state's Board of Corrections were touring the minimum-security facility on

March 17, 1999. In a July 1 letter to state senator Joseph Gartlan, a copy of which was obtained by *PLN*, Wood described his March 17 encounter with Angelone:

"I approached an individual [who was conducting some kind of tour] and I asked the gentleman [Angelone] if I could ask him a question, and he replied,

'shoot,' so I asked him why the heat registers [are] so high up on the wall when everyone knows that hot air rises and cold air descends..."

Wood says, "[Angelone] responded by saying, 'No, son, everyone knows that cold air rises and heat settles,' and I stated, 'No sir, I can't go for that one,' and a

young lady from the group interjected upon the man's comment and said that she agreed with me, which highly upset the gentleman."

Wood wrote that Angelone left the dormitory, "and several minutes later, the gentleman I'd spoken to returned and asked me if I knew who he was, and I said, 'no sir,' and then he stated that he was Ronald Angelone, the director ...."

Wood added, "[Angelone] went on to ask me if I'd ever been to Red Onion ... and when I said no, Mr. Angelone said, 'well, you'd better pack your stuff because y re on your way there,' and then he walked away."

"Not 20 minutes later several correctional officers came into the dormitory and ordered me to pack up my belongings after which I was placed in in an isolation cell and the following day I was transferred to Red Onion State Prison," wrote Wood, who had only six months left to serve at the time.

Department spin doctor Larry Traylor told the *Times-Dispatch* that "this inmate did stop the director... he mouthed off to the director. The director was extremely annoyed. Yes, he was upset by this inmate's attitude in front of the board, in front of the director, and in front of other inmates," said Traylor. "It was seen as a challenge to Angelone's authority," he said.

Red Onion is a Level VI prison. A "classification score" of 34 or above is generally needed to be sent there. VDOC records obtained by the *Times-Dispatch* show that Wood arrived at Red Onion on March 18, 1999. An April 22 departmental "Inmate Reclassification Score Sheet" gave Wood three points. It indicated that Wood had no prior disciplinary infractions. Three points would ordinarily place a prisoner in a Level I minimum security facility. However, a "discretionary override" for "Needs to Establish Stable Adjustment" qualified him as one of Virginia's worst of the worst.

"I saw this man get shot in the face," said Wood, describing the kind of "stable adjustment" commonly available at Red Onion. "My life was in danger there. And I was scared for my life. Right now I take medication to hold onto my nerves, and I wasn't like this before I was subject to this." ■

Sources: *Richmond Times-Dispatch*, *Human Rights Watch*, Reader Mail

## CLARIFICATION MEMO

**To:** R.O.S.P. Inmate Population 6/27/99

**From:** Warden G. Deeds

A.W.O. J. Armentrout

**Subject:** Mass Movement and Pod Recreation

To better facilitate a safe and orderly institutional operation, the following procedure is to be **strictly adhered to** when entering and exiting your assigned cell, and when entering and exiting the pod during mass movement to and from the Dining Hall or Recreation.

### MASS MOVEMENT

(1) The floor officer will announce, prepare for ( Chow or Recreation).

(2) You will be given 5 minutes ( by the officers watch ), to get ready to exit your cell.

(3) Your cell door will be opened and you are to step out and (**Remain in front of your cell** ) until your door is closed.

(A) *Any attempt to move away from the front of your cell toward another open cell will be considered an aggressive act that may result in the use of Firepower.*

(4) Once your door is closed, you are to exit through the vestibule in a single line, when called for by the officer.

(A) *Any act or attempt to (Break the line, group up or group around) Another inmate will be considered an aggressive act which may result in the use of Firepower.*

(5) No single line will be required while in the pod or on the boulevard in route to the Chow Hall.

(6) You will enter and exit the Chow Hall in a single line.

(7) Upon returning from Chow or Recreation, you will stop at the red line in front of the building and then re-enter the building in a single line.

(A) *Any attempt to (Break line, group up or group around) another inmate will be considered an aggressive act which may result in the use of Firepower.*

(8) You are to go directly to your cell and wait in front of your cell door until it is opened.

(9) Upon your cell door being opened, you are to enter your cell and the door will be immediately closed.

(A) *You are not to attempt to step back out of your cell or to hold the cell Door open. Any attempt to do either will be considered to be an aggressive act which may result in the use of Firepower.*

## PLRA Round Up

**Filing Fee Refunded in Habeas Case:** A federal district court in Massachusetts held that a habeas petitioner had incorrectly been required to pay the appellate filing fee. Because the Prison Litigation Reform Act's (PLRA) filing fee requirements do not apply to habeas petitions the court ordered the filing fee refunded to the prisoner. See: *Austin v. Vose*, 40 F. Supp.2d 487 (D MA 1999).

**No Filing Fee Required if IFP Denied in DC Circuit:** Reflecting a widening split between the circuits on this issue, the court of appeals for the District of Columbia circuit held that when prisoner plaintiffs are denied In Forma Pauperis (IFP) status under 28 U.S.C. § 1915(g) (the "3 strikes" provision of the PLRA) they do not incur liability for the appellate filing fees. This approach has been adopted by the 3rd, 5th and 9th circuits. The 2nd, 7th and 8th circuits have held that prisoner plaintiffs become liable for the full filing fees under the PLRA when they file the suit or notice of appeal, regardless of whether or not the request to proceed IFP is granted or denied by the court. Thus, in the DC circuit, a prisoner plaintiff denied IFP status on appeal can withdraw the appeal without penalty or prepay the full filing fee and proceed with the appeal. The court also held that "strikes" under 28 U.S.C. § 1915(g) become final when the period for filing an appeal from such dismissals has passed. See: *Smith v. District of Columbia*, 182 F.3d 25 (DC Cir. 1999).

**Tenth Circuit Clarifies Three Strikes:** The court of appeals for the Tenth circuit held that under 28 U.S.C. 1915(g), which prohibits IFP status for prisoner litigants that have had three or more suits dismissed as frivolous, malicious or for failing to state a claim upon which relief can be granted. Habeas petitions do not count as "strikes" under the PLRA because they are not actions for PLRA purposes. The court held that district court dismissals for not count as "strikes" for § 1915(g) purposes until 1) the litigant has exhausted or waived his right to appeal; 2) a district court dismissal under 28 U.S.C. § 1915(e)(2)(B) affirmed on appeal counts as one "strike"; 3) a dismissal reversed on appeal does not count as a "strike"; 4)

if the appeals court dismisses as frivolous the appeal to a district court dismissal under § 1915(e)(2)(B), both dismissals count as "strikes"; and 5) If the appeals court dismisses as frivolous a prisoner's appeal in which the district court entered judgment for the defendants, the dismissal of the appeal counts as a "strike." See: *Jennings v. Natrona County Detention Center*, 175 F.3d 775 (10th Cir. 1999).

**Wisconsin Release Account Used to Pay Filing Fees:** A federal district court in Wisconsin held that a prisoner's "release account" can be used to pay PLRA filing fees. The Wisconsin DOC takes a percentage of prisoners' money which it places in an account that can only be accessed when the prisoner is released. Frederick Spence filed suit and paid a portion of the PLRA filing fee from his prison trust account. Spence then filed a motion asking the court to seize the remainder of the amount owed from his release account. The court granted the motion.

The court held that for PLRA purposes there was no distinction between the release account and a regular trust account. Since Wisconsin prisoners have a vested property interest in the funds in both accounts, they are the ultimate owners of the money, even if the state temporarily restricts their access to it. See: *Spence v. McCaughtry*, 46 F. Supp.2d 861 (ED WI 1999).

**Warden Purged of Contempt:** In the August, 1999, issue of *PLN* we reported *Hall v. Stone*, 170 F.3d 706 (7th Cir. 1999) in which Bureau of Prisons (BOP) warden John Farelo was held in contempt of court for failing to pay a prisoners' PLRA filing fee. In this ruling the appeals court purged Farelo of contempt after he claimed he had established a procedure to ensure PLRA filing fees are paid to the courts. The court emphasized that PLRA fee payment orders under 28 U.S.C. § 1915(b) are directed to the prison warden to disburse payment from prisoner trust accounts. "When a judge issues an order directly to a trustee in that fiduciary role, the trustee must comply unless the order is stayed or set aside on appeal, under no circumstances may the judicial order be ignored or countermanded by the trust

beneficiary." See: *Hall v. Stone*, 179 F.3d 1043 (7th Cir. 1999).

**PLRA Doesn't Apply to Civil Commitments:** A federal district court in Massachusetts held that the PLRA does not apply to sexually dangerous people who are civilly committed, even when the facility they are housed in is in fact a prison administered by the state prison system. In 1975 a consent decree was entered regarding conditions at the Massachusetts Treatment Center for Sexually Dangerous Persons, run by the Massachusetts DOC. The defendants recently sought to terminate the decree. The court held that 18 U.S.C. § 3626(b)(2), the PLRA provision that allows for the termination of prison and jail consent decrees, does not apply to the civilly committed since by statutory definition they are not "prisoners" and the facility, though a "prison" in every meaningful sense of the word, is not a "prison" under the PLRA. All courts to consider the PLRA's applicability to civil commitments have likewise concluded it is inapplicable. See: *King v. Greenblatt*, 53 F. Supp.2d 117 (D MA 1999).

**28 U.S.C. § 1915A Applies to All Prisoner Suits:** The court of appeals for the Second circuit held that 28 U.S.C. § 1915A applies to all suits filed by prisoners. Section 1915A requires district courts to screen civil suits filed by prisoners against government officials/entities and dismiss the suit if it fails to state a claim upon which relief can be granted, is frivolous, malicious or seeks damages from a defendant immune to money damage actions. The court held that § 1915A applies to in forma pauperis suits as well as actions in which the prisoner pre-pays all filing fees. The court held that § 1915A dismissals do not require that process be served on the defendants or that the plaintiff be given an opportunity to respond prior to the dismissal. This ruling is in agreement with the Fifth, Sixth and Tenth circuit but directly in conflict with other circuits. See: *Carr v. Dvorin*, 171 F.3d 115 (2nd Cir. 1999).

**Litigation Costs Not Dischargeable in Bankruptcy:** A federal bankruptcy court in Idaho held that the PLRA's modification to the bankruptcy code,

11 U.S.C. § 523(a)(7), which exempts from chapter 7 bankruptcy discharge any debt involving filing fees and litigation costs, applies to non prisoners as well as prisoners. The court rejected the argument in this non prison case that § 523(a)(7) applies only to prisoners. "If Congress preferred a restricted

approach, it could have limited the operation of the exception to fees imposed by a court against a prisoner. It failed to do so and while it may have constructed a tiger pit to trap a mouse, only congress can properly remedy the error." See: *In Re Hough*, 228 B.R. 264 (D ID 1998). ■

## Prison Guard Golf Tourney Tees off Town

Officials of the upstate New York town of Canton will no longer play host to a golf tournament for prison guards after the last event turned into a "drunk fest."

During the August 13, 1999 event, New York prison guards urinated in public view, damaged the greens with golf carts, turned "doughnuts" with carts in the fairways and played bumper cars, according to the director of Canton's Partridge Run Golf Course.

"Upon registration I counted 93 coolers, numerous bottles of vodka, rum, and gin," Kathy Lawrence, director of the golf course, said when describing the outing as a "drunk fest" to the *Associated Press*.

Department of Correctional Services spokesman Mike Houston said the department was investigating the allegations.

In a letter, Canton Mayor Ronald Houle told Corrections Commissioner Glenn Goord that his town, located about 120 miles northeast of Syracuse near Lake Ontario, would no longer play host to the annual Tri-Facility Golf Tournament. He also submitted a list of expenses for damage to golf carts and greens. ■

Sources: *Associated Press*, *Syracuse Post-Standard*

Harvey R. Cox, MS  
Corrections Consultant  
(Federal Inmates)

Professional Assistance in

*TRANSFERS (Also State Inmates)*

*HALFWAY HOUSE PLACEMENT*

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V-Tech

# Washington Prison Slavery Runs Competitors Out of Business

by Paul Wright

*PLN* has extensively reported that, contrary to the claims of its supporters, prison slave labor has historically cost free world workers their jobs and eliminated businesses who are unable to compete with prison slave wages. Prison slave labor also drives down wages and ill serves prisoners in terms of providing adequate compensation for their labor or meaningful post release job skills. In the March, 1997, issue of *PLN*, "Slave Labor Flies: Boeing Goes to Prison," I reported the first published story about Microjet and its activities as an employer of prisoners at the Washington State Reformatory (WSR) in Monroe, WA. Microjet, owned by Kenneth Piel, uses high pressure water cutting technology to cut a variety of flat stocks such as alloys, ceramics, and stone. The article noted that the most likely impact Microjet would have would be the elimination of jobs for non prisoners and to push wages down.

On July 16, 1999, the same coalition of water jet companies that has now sued Microjet and the Washington Department of Corrections (DOC) Correctional Industries (CI), [see sidebar for details on the suit] met with the CI board to express their concerns about Microjet. Scott MacFarlane, president of Microjet competitor Cutting Technology, said "Basically, we just want an even playing field." At least one water cutting company, Talon Industries, claims it was forced out of business due to unfair competition by Microjet and had to lay off its 23 free world employees as a result. Microjet employs 21 prisoners at WSR.

## Corporate Welfare

The not so secret fact about prison slave labor is that it is not economically viable. Having prisoners work fulfills an ideological function of revenge and the exercise of state power, but in terms of economic soundness it is a failure. In Washington, and probably every other state, prison industries programs would not exist if they were not subsidized by the state and, in the case of prison industries run by the state, have exclusive source contracts with government agencies. It is the state subsidy that has

Microjet's competitors upset. In 1994 the Washington DOC spent \$5.5 million to build a 56,000 square foot industrial area at WSR for use by private businesses employing prisoner slave labor. Microjet currently uses 11,000 square feet of this space, rent free, and another 1,000 feet of warehouse space, also rent free. MacFarlane claims that this amount of space would cost around \$60,000 a year in rent if Microjet had to rent its space in the local community.

Microjet also gets free water and sewage services and annually buys \$3,500 worth of electricity from the DOC at a discounted rate. By contrast, MacFarlane said his 11 employee company spent \$18,000 in electricity and \$5,000 for water and sewage treatment last year.

Probably the biggest savings, and biggest incentive, lies in the wages paid to prisoner workers. State law requires that prisoners employed by private businesses be paid the "comparable wage" of non prisoners doing the same work. However, the DOC has issued regulations interpreting this to be sixty percent of the comparable wage. Water jet workers outside prison start out at \$14 an hour with benefits. When asked by the *Seattle Times* how much he paid his prisoner workers, Piel refused to answer. Cathy Carlson, a DOC spokesperson, said she could not comment on the salary range Piel pays his prisoner workers because, she claimed, he had filed suit against the DOC to prevent them from disclosing any "confidential information" about his company. One would think that a business this heavily subsidized by the government would let taxpayers know where their money is going and what is being done with it.

In a *PLN* exclusive, confidential sources at Microjet disclosed that before October 1, 1999, Microjet paid its machine operators a top wage of \$8.65 an hour. Microjet pays no health benefits, vacations, insurance or other employee benefits on its prisoner workers.

In response to the lawsuit filed by the Washington Water Jet Workers Association on August 31, 1999, the DOC ordered a number of its private business partners, including Microjet and Elliot

Bay Metal Manufacturing, (a company that does welding and metal manufacturing), to pay their prisoner workers more. Apparently this is to ward off the plaintiffs claim that these businesses are not complying with the state law "comparable wage" requirement. The DOC ordered Microjet to give its prisoner machine operators a \$2.54 an hour raise. Now, ten of Microjet's 21 prisoner employees are paid \$10.64 an hour, with no benefits. Which is still about a third less than non prisoner water jet operators earn. *PLN*'s confidential sources at Microjet also report that the company is further evading the comparable wage requirement by manipulating the prisoners' job classifications. Thus, some cutters are now called "assemblers," and being paid less, even though their duties remain the same as before: operating cutting machines. None of the prisoners have a written job description, at least none that they know of. All job descriptions are oral.

Rick Trelstad, the owner of Talon Industries, the water jet cutting company that went bankrupt, said he could not compete because Microjet consistently underbid him for work. "If you were operating a trucking company and you didn't have to buy gas, you have a significant advantage over your competitors. Microjet is taking the whole industry apart," he said.

Jet Point Technologies owner John Swapp said he didn't have a problem with prisoners working, "But I can't compete with free rent." MacFarlane summed up the feelings of Microjet's competitors when he said "Microjet is screwing the state of Washington with the state's consent, with taxpayers' money. They're going to annihilate the private sector."

David Burt, chairman of the Correctional Industries board, told the *Seattle Times* the ongoing canard that prisoners working for private businesses like Microjet save the state money by becoming "productive taxpayers."

The DOC claims that 430 of Washington's 15,000 prisoners are employed by private businesses. The state seizes 20% of the prisoners gross pay for the state's general fund, another 5% is seized for a victim's compensation fund.

In 1998 the state took \$659,000 from prisoners salaries for their "cost of incarceration" and another \$174,000 went to the viciim's fund.

By contrast, the state of Washington spent \$4.47 million in the 1999-2000 budget for the operating costs of CI. The

capital construciion budget for CI is separate. In 1999 alone CI spent \$3 million in construciion costs to expand CI facilities. Another \$16 million is projecied as future construciion costs so that businesses like Microjet will have rent free space. Put another way, all 430 Washington prison-

ers employed by CI's private business partners will have to work more than 8 years before the DOC recoups the construciion cost of the industrial building it built at WSR in order for Microjet and others to do business rent free. This figures excludes all other CI operating

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## Water Jet Companies Challenge Washington Slave Labor Laws

On August 31, 1999, the Washington Waterjet Workers Association (WWWA) filed suit in King county (Seattle) superior court in Washington, challenging the state Department of Corrections (DOC) practice of allowing private businesses to employ prisoner labor. The defendants are Howard Yarbrough, administrator of the DOC's Division of Correctional Industries (CI), and Jet Holdings, Ltd., which is the business name of Microjet, and its owner, Kenneth Piel.

As reported in the March, 1997, issue of *PLN*, Microjet is a privately owned company based at the Washington State Reformatory in Monroe, Washington, which uses high pressure water cutting technology to cut and manufacture various hard materials, including stone, flatstocks, ceramics and alloys. Microjet's customers include big companies like Boeing, which sub contract work, but most of Microjet's customers are small local and regional companies.

The Washington DOC provides Microjet, and its other 14 private business partners, with rent free industrial manufacturing space, along with free water, sewage, heating, ventilation and trash removal and electricity at the reduced rate the DOC pays. Microjet currently gets about 11,000 square feet of industrial space at WSR and another 1,000 square feet of warehouse space at the prison for free.

The lawsuit, filed by Microjet's business competitors who do not employ prison slave labor, claims that the Washington DOC's practice of allowing private businesses to employ prison slave labor violates Article II, section 29 of the Washington state constitution which prohibits the leasing of convict labor to private businesses. The plaintiffs claim that Article VII, section 9 also prohibits the leasing or provision of buildings by the state. The lawsuit further alleges that RCW 72.09.130, which allows for the em-

ployment of prisoners by private businesses, violates Article I, section 12 of the Washington state constitution which prohibits the enactment of laws granting special privileges or immunities not enjoyed by all citizens.

The suit claims that Microjet and the Washington DOC are also violating RCW 72.09.070 which requires that prisoners employed by private businesses be paid wages "comparable to the wage paid for work of a similar nature" outside the prison. [The DOC, however, has enacted WAC 137.80.020(4) which states that companies need only pay prisoners 60% of the comparable wage for similar work, or the minimum wage, whichever is greater.] Waterjet cutters outside prison start out earning \$14.00 an hour, with benefits, while none of Microjet's prisoner workers was paid more than \$8.65 before the suit was filed. The plaintiffs also claim that the state defendants give public funds, credit and buying power to their private business partners, in violation of the state constitution.

RCW 72.09.100(1) requires that prisoners be given meaningful employment to learn skills to earn a living upon release. The lawsuit claims that in the four years Microjet has operated, no prisoner has ever applied for a job in the water jet cutting business in Washington. (See accompanying article.)

The plaintiffs allege that the defendants are also violating state laws that require prison industries to invest only in programs that have a minimal impact on state businesses. The plaintiffs claim that this state of affairs constitutes an unfair business practice and, lastly, that the transport of goods made by Microjet in interstate commerce violates 18 U.S.C. § 1761.

As relief, the plaintiffs seek declaratory relief, triple damages, attorney fees and costs and an injunction prohibiting the ongoing violation of the plaintiffs' rights. See: *Washington Water Jet Work-*

*ers Association v. Yarbrough*, King County Superior Court, case No. 99-2-20202-3SEA.

If the suit is successful it will end the employment of prisoners by private businesses in Washington state. The most obvious way to moot the suit would be for the proponents of slave labor to amend the state constitution to allow for convict leasing. This is what happened in California after the California supreme court held that leasing prisoner labor to private companies violated that state's prohibition on convict leasing. See: *Pitts v. Reagan*, 92 Cal. Rptr. 27 (1971). However, it is unlikely that all the constitutional issues raised in this lawsuit can be easily amended away.

Washington enacted its ban on convict leasing based on the dismal experiences of other states as well as local experiments with the practice. For a more complete description of the convict leasing system at the turn of the century see Alex Lichtenstein's *Twice the Work of Free Labor* and David Oshinsky's *Worse than Slavery*. Both books are available from *PLN*; see page 31 for ordering information.

To those who ask where organized labor is on this issue in Washington, the answer is that they are absent. While organized labor occasionally pays lip service to opposing prison slave labor they have done little to oppose the practice. When contacted over two years ago about filing a similar suit challenging prison slave labor in Washington, the State Labor Council and the Boeing Machinists Union said they were "interested" but not willing to do anything beyond that. One of Washington's leading labor law firms was willing to undertake the litigation for a nominal fee. Generally, businesses have done more to combat prison slave labor in recent decades than organized labor has, which may be why union membership is declining.

## Waterjet (continued)

and construction costs over that 8 year period since the WSR building alone cost \$5.5 million to build. This clearly refutes the big lie that prison industries "make money for the state." Absent the state subsidy, prison industries would not exist. This figure does not take into account the diminished tax base resulting in businesses getting rent free space courtesy of the state. Were they not located in a state prison they would be paying property taxes on any buildings they owned, money usually used to pay for local schools.

In addition to the aforementioned 25% of their salaries which are seized by the state, prisoner workers are paying state and federal payroll taxes as well as fines, restitution, court costs, child support, etc.

So while businesses get rent free space, prisoners are paying for their "room and board". Business gets a free ride on the backs of prisoners as prisoners pay their bosses rent.

### Sour Grapes?

Microjet's owner Kenneth Piel dismisses his critics as poor businessmen who made bad decisions. Piel credits his success to good products, skillful marketing and a diversified customer base. Ironically, he said one effect of local publicity about the lawsuit against his company is that it generated a rise of inquiries from potential customers.

Piel told the *Seattle Times* that he loses efficiency by operating in a prison. As an example, he said he lost ten hours of production time when Robert Green escaped from WSR in July, 1999. What Piel didn't say is that Green escaped from his job at Compuchair, another privately owned business at WSR that makes office furniture. The only reason Green was able to escape in a company delivery van is because the private business was in the prison in the first place.

Confidential sources at Microjet told *PLN* that Microjet has gross sales in the \$2-5 million range and a 35-40% profit margin. Piel does not hide the fact that Microjet is prison based and uses prison slave labor, but he doesn't advertise it either. Significantly, part of this "don't ask, don't tell" policy is that

none of Microjet's products are marked or labeled as having been made with convict labor. 18 U.S.C. § 1762 requires that all products made with convict labor be labeled as such. Failure to label prison made goods as such is a felony. However, it appears that in the 66 year history of this law, no one has ever been prosecuted under it.

Microjet workers told *PLN* that Piel requires them to buy their own safety shoes and calipers, but the prisoners do not "own" the items, Microjet does. A modern form of share cropping.

*PLN*'s Microjet sources also state that the company is an efficiently run business. However, none of the Microjet sources who spoke to *PLN* on condition of anonymity believe Piel is an altruist: he is using prison labor to make money and when he can't, he'll go elsewhere.

### Preparing Prisoners for Real Jobs?

David Burt, the CI chairman, told the *Seattle Times* that the other role of prison industries like Microjet is to give prisoners work skills to use when they are released after prison. This is another ongoing lie about prison slave labor that is frequently repeated in the media with little critical examination. In their lawsuit, Microjet's competitors specifically state that no ex prisoner has sought employment in the water cutting industry since Microjet set up shop in prison.

Once more, the facts speak for themselves. Several Microjet employees told *PLN* that upon being hired by Microjet they were required to sign a contract stating they would not work for any other water jet cutting company for at least two years after leaving Microjet. Another reason for the dearth of ex prisoners using their new found skills in the outside world is simple: first they have to get out.

As one Microjet employee put it, "Shit, half of us are doing life without parole and only one of us gets out in the next ten years." A long term lifer workforce is good for Microjet, but state law says prison industries should give prisoners job skills for use after prison. The DOC's CI will not state how many of the 430 prisoners employed by private businesses are serving life sentences, or terms that make it unlikely the prisoner will survive, which begs the point of why don't they know? The manipulation of the corporate media

on this issue was seen when the *Seattle Times* did a story on Microjet. The story duly repeated the role of prison industries in giving prisoners job skills for use when they are released from prison. The article featured a photo and interview with Walter Navas, the lone Microjet employee who gets out of prison within the next ten years.

The paradox of prison slave labor is well illustrated in this case. On the one hand, non-prison based businesses are forced out of business when they can't compete with state subsidized competitors. To remain competitive, the remaining businesses must lower the wages they pay their workers in a race to the bottom.

Historically, the Washington Correctional Industries board has been little more than a toothless lapdog cheer leading prison slavery. Their stated goal is to expand prison slavery in Washington state. The CI board dismissed the water cutters' concerns at the July, 1999, meeting by saying that under state law they must only consider if a business will replace its own workers with prisoners, not whether competing non prison businesses will be hurt.

Under this rationale, it is interesting that the CI board was completely silent about Omega Pacific. Omega Pacific is a company that makes carabiners and other climbing equipment. In 1995 Omega Pacific closed its Redmond factory, laying off the 40 employees it paid \$7.00 an hour, with benefits. The company then moved its entire operation to the Airway Heights Corrections Center near Spokane where it now employs about 45 prisoners. [See *PLN*, Mar. 1997, for further details.] However, the CI board is silent even where Washington businesses replace their entire work force with prisoner slaves.

### On the Backs of Prisoners' Families

In 1995 the Washington state legislature enacted RCW 72.09.480 which mandates the seizure of 35% of all money sent to prisoners from sources outside the prison. *PLN* has extensively reported the litigation ensuing over this issue. The purpose of this statute was to ensure prisoners who did not work for private businesses had as much of their money taken by the state as those who did.

Little known is the fact that the legislature and Washington DOC have

earmarked the \$1.2 million it takes from prisoners and their families under this statute annually to support its private business prison industries program. See: RCW 72.09.111(3). Thus, the families of prisoners wind up directly subsidizing a business like Microjet which is grossing millions of dollars in sales each year! It should be noted that to date the state has been unable to use the money seized under the 35% law for this purpose since the money is in an escrow account pending resolution of the assorted legal challenges to the law.

There would be widespread outrage if every Washington citizen had to give Microsoft 35% of their income, and the state government gave Microsoft rent and utility free office space. Or if only Microsoft's workers paid taxes and the company didn't. However, when smaller companies such as Microjet receive corporate welfare and government handouts, it meets with relative silence. In large part this is due to the fact that modern day prison slavery is shrouded in secrecy and, most importantly, is rarely subjected to any critical analysis. Corporate media coverage of prison labor issues is almost invariably characterized by a suspension of disbelief on the part of journalists and their editors.

### **Towards Equitable Slavery**

One result of the water cutters lawsuit is that prisoners in several businesses have achieved significant pay raises as the DOC makes a belated, half hearted attempt to comply with the state's "comparable wage" requirement. While prisoners are being paid more, they are still objectively underpaid compared to non prisoner workers.

As long as slavery remains enshrined in the 13th amendment to the U.S. constitution, prisoners will remain slaves of the state. Just as the civil war illustrated a conflict between the slave owning capitalists and non slave owning capitalists, amidst allegations of unfair competition by the latter, the conflict between Microjet and its competitors hinges on the use of prison slave labor. Essentially, this is an inter-capitalist feud. Microjet will pay its prisoner employees as little as it can get away with in order to maximize the amount of money Piel can put into his pocket, while his competi-

tors will be mollified if Microjet's government advantages are eased.

What this conflict illustrates is that the interests of prisoners, their families, taxpayers in general, workers and the businesses who don't employ prisoners, are not well served by the current model of prison slavery. Most concerns could be met by a simple solution: pay prisoners the same wages non prisoners receive and make sure the prisoner actually receives and keeps their pay, subject to only those deductions made to the paychecks of non prisoner workers. Prisoners would also have the right to collectively organize and bargain over their pay and work conditions. What makes this simple idea revolutionary is the insurmountable fact of prisoners' status as slaves, mute beasts who have no say in the fact or condition of their economic exploitation.

Given the American political situation today, this state of affairs will not change until such time as prisoners demand the right to be paid, and actually keep, a fair wage for a fair day's work. For now, most prisoner slaves are more than happy to get whatever crumbs are swept to them off the slavers' tables. ■

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# Sylvia Baraldini Goes Home after Sixteen Years

by Julia Lutsky

On August 25, 1999, after more than a decade of battle to return to her homeland, Sylvia Baraldini was transferred from the federal prison at Danbury, Connecticut to the Rebibbia prison in Rome, Italy. She traveled in a private jet sent by the Italian government; when she arrived supporters threw roses in front of the car that carried her to Rebibbia. Several Italian cities and towns have offered her honorary citizenship, calling her the victim of American injustice.

Baraldini was 13 when her diplomat father brought her to this country in 1961. Introduced to the anti-war and civil rights movements when she attended the University of Wisconsin during the 60s, she became active and remained in the struggle joining the Black Panther Party and working with the Puerto Rican independence movement.

In 1983 she was convicted under the RICO act of "participating in a violent revolutionary group called 'the Family' that committed a series of armed robberies of armored trucks. During the crimes two Brinks guards and two in Nyack, N.Y., police officers were killed." [*Seattle Times*, 8/25/99] That she happened to be in Zimbabwe when the crimes were committed made no matter: the RICO statutes hold that all the members of an organization are guilty of the crimes committed by any of its members. At that trial she was also convicted of having participated in the 1979 New Jersey prison break that freed Assata Shakur (Joanne Chesimard). Shakur fled to Cuba where she currently lives. Baraldini was not so lucky. She received 20 years for subversive association (under the RICO statutes), 20 for having participated in Shakur's escape and 3 for contempt of court: a total of 43 years. She had neither killed nor injured anyone, yet, according to *Brecha* (Uruguay), that same year a Cosa Nostra godfather was convicted in the murders of 20 people and received two years less. The difference was that while the mafia godfather's crimes had not threatened the system, Sylvia Baraldini's had.

While imprisoned in the United States, she suffered isolation in the "white tombs" of Lexington, Kentucky, now

closed because of its inhumane conditions. She developed a uterine tumor during her imprisonment and when the operation to remove it was performed she remained handcuffed throughout the entire procedure.

The Strasbourg convention, which the United States has ratified, specifies that a prisoner has the right to serve his or her term in his or her country of origin. Because Baraldini was condemned unjustly for so long a period and because she never renounced her beliefs she has become a symbol of the inequality in international relations and in the reach of international law itself. Though the United States is quick to note the human rights violations of many other countries it has consistently turned a blind eye to its own, her imprisonment being a case in point. Since the end of the eighties and throughout this decade, six Italian governments have put Baraldini's case in their bilateral agenda with the United States. Until now nothing has come of these efforts, though an international movement had sprung up demanding her return to Italy. One of Italy's most popular singers, Francesco Guccini, often sang that "Sylvia neither robbed nor killed anyone." Several times in recent years tens of thousands of people have demonstrated in front of the U.S. Embassy in Rome and attended concerts dedicated to her. Hundreds have demonstrated in Washington, D.C., though those demonstrations have been conveniently overlooked by the corporate media for whom the Baraldini case never existed. She was never regarded as a fighter for human rights but rather as a "terrorist." That she dedicated herself in prison to teaching English to Latin American women prisoners made no matter. "The United States government showed itself to be blind and deaf [to all entreaties]. The arduous trips made by so many Italian Chiefs of State, obligated by the popularity of her case, to try to shape the inflexibility of the White House proved useless." [*Brecha*, Uruguay, 9/3/99, trans. by *PLN*]

It was not until a year and a half ago that the possibility of her transfer began to become reality and it took the deaths of 20 vacationers to do it. In February of

1998 a US military jet cut the cable carrying them between the summit and the base of a skiing resort mountain in northern Italy. Italian justice was denied the right to try pilot and crew; brought to the United States they were exonerated of charges. This incident, Italy's cooperation in the war against Yugoslavia, and the mounting international pressure to bring Baraldini home finally resulted in her transfer.

Conditions of her transfer, however, continue to violate international law: in any other country, she would be a free woman already. Nonetheless the Italian government has agreed that she will not leave prison before July of the year 2008. She is not eligible for any pardon, amnesty or exoneration that might be granted to any prisoner detained by the Italian authorities: she must serve her sentence in its entirety. She would be allowed to attend the funeral of her mother but only under strict guidelines; there is no other exception provided. In point of fact, she had not been able to see her elderly mother until they embraced in the airport in Rome; for many years her mother's health has precluded the inter-continental flight.

Sylvia is a longtime *PLN* subscriber and since its inception *PLN* has supported Sylvia's campaign to return to Italy. We wish Sylvia the best. ■

Sources: *Seattle Times*, 8/25/99; *Brecha*, Montevideo, Uruguay, 9/3/99, *New York Times*, 8/26/99 from *AP*

## Attention Humanists

Incarcerated humanist pursuing suit against BOP seeks other humanists in federal and other prisons. Federal prisoners may wish to join lawsuit or form chapters in their prisons. Contact Ben Kalka, No. 84449-011, FCI Edgefield, Unit B-1, P. O. Box 724, Edgefield, SC 29824 through Attorney Christopher Cannon, Esq., 600 Harrison St., Suite 535, S.F. Calif. 94107.

## Israeli Supreme Court Limits Torture

In a Sept. 1999 ruling, Israel's Supreme Court outlawed the systemic torture of Palestinian detainees by the country's security forces.

Israeli authorities had long claimed that "moderate physical pressure" during interrogations was necessary to combat terrorism. Palestinian prisoners, many detained without being charged, were subjected to violent shakings, sleep deprivation and physical abuse. Ten prisoners have died under interrogation since 1987.

Unlike other nations that practice but deny the use of torture, Israel has attempted to justify its official policy of physically abusive interrogations. Although Israeli officials say torture is required to obtain information about guerrilla threats, human rights advocates have noted that interrogations are performed routinely and often stop on weekends when the interrogators go home, indicating there is no pressing need to justify the use of torture.

Israeli lawmakers denounced the Supreme Court's ruling and called for

legislation to circumvent the decision. Deputy Defense Minister Ephraim Sneh said the verdict was "almost completely irrelevant to the world we live in."

The Israeli Supreme Court did allow a "good faith" exception for the use of torture: Security officials will be held im-

mune from prosecution if they can show that torture was necessary to save lives, such as to stop an imminent guerrilla attack. ■

Source: *The Tennessean*

## Torture "Aberrational" in U.S.

On October 15, 1999 the Clinton administration submitted a report to the U.N. Committee Against Torture, admitting abuses in the United States but calling them rare.

"We fully acknowledge in this report there continue to be areas of concern, contention and criticism," said Assistant Secretary of State Harold Koh. "But we note torture does not occur in the United States except in aberrational situations and never as a matter of policy."

The report, prepared by the State and Justice departments as part of a 1994 international agreement against torture, cited police brutality, excessive use of

force, physical and sexual abuse of prisoners, and lack of adequate training and oversight of police and prison guards.

The report described several specific incidents, including the beating of Rodney King by Los Angeles police officers, the sexual assault on Abner Louima by New York officers and excessive use of force by federal agents at Ruby Ridge, Idaho and Waco, Texas.

"Abuses occur despite the best precautions and the strictest prohibitions," the report concluded. "No government can claim a perfect record." ■

Source: *The Tennessean*

Tele-net

## Michigan DOC Settles DOJ Sexual Abuse Lawsuit

by Maia Justine Storm

This past May, the Michigan Department of Corrections (MDOC) agreed to settle a lawsuit filed by the U.S. Department of Justice (DOJ) which alleged a pattern and practice of sexual misconduct and invasions of privacy at the women's prisons in Michigan. The DOJ filed its suit in 1997, reported by *PLN* in October, 1997. During the investigation, so many women complained of retaliation that Human Rights Watch published a report, *Nowhere to Hide: Retaliation Against Women in Michigan State Prisons*, outlined in *PLN*'s February, 1999, issue.

According to the terms of the agreement (see sidebar), the DOJ will agree to dismiss its claims if the MDOC is found in substantial compliance by a mutually agreed-upon expert. In fact, the DOJ has agreed that the stipulation to dismiss will contain this language: "There is no pattern or practice of Defendants violating female inmates' constitutional right to be free from sexual misconduct and sexually inappropriate behavior."

However, according to an attorney who represents female inmates, Deborah LaBelle, there have been 10 sexual assault convictions of male guards since 1995. Thirteen more are pending. She calls for male guards to be restricted from working in women's housing units. MDOC Director Bill Martin, who terms the lawsuit "bogus," is now also considering using only male guards in male prisons. This change would affect thousands of

jobs, since there are 40 prisons and 14 camps for men as compared with two prisons and one camp for women. LaBelle argues that it is only the women's prisons which should have the same gender policy, since "there have been no reports of women guards raping male inmates."

This argument is taking place at a time when the MDOC is in need of 2,500 new guards by 2001, and is considering relaxing its educational requirements in order to fill the need.

Director Martin is also changing MDOC policy to require prison uniforms for all prisoners and to take away most of their personal clothing. This policy, which will be enormously costly for the MDOC, is scheduled to proceed in stages, by security level. It is unclear at this point if court challenges to the policy by prisoners will be successful.

State legislators have responded to the lawsuit and subsequent publicity by introducing a bill making sexual acts by guards against prisoners a felony. In addition, Attorney LaBelle, a recent recipient of a Champion of Justice award from the State Bar of Michigan, vows to carry on the women's fight, since they are not bound by the settlement agreement and are free to pursue their own lawsuits. "There have been assaults every year," she asserts, "every shift and every month."

See: *United States v. Michigan*, USDC EDM, Southern Div., No. 97-CV-751514-BDT ■

## Prison Health Services Refuses to Pay

The U.S. court of appeals for the Eleventh Circuit held that a forum selection clause in an indemnity agreement between the Sheriff of Polk Co., Florida and Prison Health Services (PHS), which allowed contract disputes to be brought in the state circuit court, was mandatory rather than permissive.

This case offers a classic example of the privatization of prisoner health care. Cutting costs to increase profits frequently leads to tragic consequences, and in the long run costs are increased, while prisoner health care declines.

In this instance, PHS entered into a contract with the Sheriff to provide medical services to prisoners in the county's jails. Four years later, a county jail prisoner suffered a head injury, which required immediate hospitalization. However, PHS failed to render the necessary treatment and the prisoner lapsed into a vegetative state.

As a result of the prisoner's chronic condition, his guardian brought suit against the Sheriff. Since the contract between the Sheriff and PHS contained an indemnity clause holding the Sheriff harmless from such claims, the Sheriff's insurer asked PHS to intervene. Contrary to the terms of the contract, PHS refused.

The Sheriff's insurer then informed PHS that the prisoner's claim exceeded the Sheriff's \$1 million policy limit, and unless PHS intervened, the insurer would settle the claim for the policy limit, plus an additional \$100,000 contributed by the Sheriff. Once again, PHS declined.

After the insurer and the Sheriff settled with the prisoner's guardian, each brought a separate action in the Polk County circuit court to enforce the indemnity agreement. PHS promptly removed both cases to the federal district court. Although the rationale behind this removal action is not evident in this opinion, it was undoubtedly based on the corporation's efforts to evade liability.

The district court construed the indemnity agreement forum selection clause as mandatory and requiring the parties to litigate disputes in the state court system. The cases were remanded back to the state court, and in a brief opinion, the Eleventh Circuit affirmed. See: *Florida Polk County v. Prison Health Services*, 170 F.3d 1081 (11th Cir. 1999). ■

### DOJ-MIDOC Sexual Harassment Settlement Terms

- Pre employment screening & criminal history checks
- Additional staff training on sexual misconduct and harassment
- Education for female prisoners regarding the agreement
- Creation of a Special Administrator position to handle complaints from female prisoners
- "Knock and Announce" policy for male guards in areas where females could be in state of undress
- Six month moratorium on cross gender pat searches
- Standard institutional dress code for female prisoners
- If 2 on-site compliance monitoring tours within six-month period after agreement are satisfactory, the Justice Department will drop its lawsuit

# Lack of Evidence Bars Disciplinary Finding of Guilt Regardless of Punishment Imposed

The court of appeals for the Ninth circuit held that it violates due process to find a prisoner "guilty" of violating a prison disciplinary rule when absolutely no evidence supports the finding. The court held it is immaterial if the prisoner can show a liberty interest was infringed or not. Expungement of the infraction is the proper remedy.

Prisoner rights attorney Mike Snedeker once commented that for many prison officials due process is a concept as alien and offensive as Maoism. The facts of this case illustrate his observation.

Harry Burnsworth is an Arizona state prisoner. In February, 1995, a prison informant told prison officials that Burnsworth was in physical danger because he owed debts. Burnsworth claimed he was in no danger and sought to remain in the prison population. A month later, Burnsworth went to prison officials and requested placement in protective custody (pc), saying his life was in danger. Burnsworth told prison officials that if he was not placed in PC he would have to "hit the fence." Burnsworth was duly placed in PC and asked to clarify his earlier comment. Rather than stay quiet, Burnsworth responded that if forced to remain in general population he would be forced to "hop the fence and run all the way to Tucson."

Based on these comments, Burnsworth was infraacted for "escape." At a disciplinary hearing he was duly found guilty and sanctioned to 40 hours of extra duty and 30 days in parole class III. No good time credits were forfeited and no segregation sentence was imposed. Based on the infraction, Burnsworth was reclassified as an escape risk and transferred to a maximum security prison.

Burnsworth filed suit under 42 U.S.C. § 1983 claiming the prison's disciplinary and classification procedures violated his due process rights. The district court granted summary judgment in Burnsworth's favor, holding the defendants had violated his due process rights because no evidence supported the disciplinary finding that Burnsworth had, in

fact, escaped or attempted to escape. The court ordered the infraction expunged from Burnsworth's prison records even though it later concluded that under *Sandin v. Conner*, 515 U.S. 472, 115 S.Ct. 2293 (1995) Burnsworth's claims did not implicate a protected liberty interest. The defendants appealed and the appeals court affirmed.

Prison disciplinary convictions must be supported by "some evidence" to satisfy due process. See: *Superintendent v. Hill*, 472 U.S. 445, 105 S.Ct. 2760 (1989). Interestingly, the prison official defendants in this case never argued that Burnsworth had received a fair hearing. "The essence of defendants' argument is that inmates must demonstrate the existence of a liberty interest before they can argue that they are entitled to procedural due process." The court rejected this argument.

The court held that it was immaterial that Burnsworth had no liberty interest in the disciplinary hearing. It relied on *Ohio Adult Parole Authority v. Woodard*, 118 S.Ct. 1244 (1998) to reach this conclusion. The court reasoned that while prisoners have no liberty interest in clemency proceedings or in a criminal appeals process, once the state creates such processes, the procedures employed must satisfy the due process clause.

"*Hill* and other cases stating that a prisoner has an interest in avoiding punishments arbitrarily imposed only 'where a prisoner has a liberty interest' do not compel a contrary conclusion.... The court in *Hill* did not address a situation where a conviction was unsupported by evidence.... Rather, *Hill*, like *Wolff v. McDonnell*, 418 U.S. 539, 547, 94 S.Ct. 2963 (1974), restates the fundamental principle of due process in prison disciplinary hearings- 'the minimum requirements of procedural due process' require that 'the findings of the prison disciplinary board must be supported by some evidence in the record.' *Hill*, 472 U.S. at 454-55, 105 S.Ct. 2768 ...."

"It is incorrect to state that due process is not violated when a prison disciplinary hearing board convicts an inmate of escape after that board holds a hearing at which no shred of evidence of

the inmate's guilt is presented." The court held that the district court's expungement order was appropriate in light of the wrong suffered by Burnsworth. Perhaps for this reason the court did not discuss the issue of monetary damages, which Burnsworth apparently did not seek. See: *Burnsworth v. Gunderson*, 179 F.3d 771 (9th Cir. 1999). ■

## Judicial Screening Applies Only to IFP Suits

The court of appeals for the Sixth circuit held that 28 U.S.C. § 1915(e)(2), which requires judicial screening of lawsuits and dismissal under certain conditions, applies only to suits filed in forma pauperis (IFP), or without the pre-payment of the filing fees. 28 U.S.C. § 1915(e)(2) is part of the Prison Litigation Reform Act (PLRA). It requires district courts to screen lawsuits and sua sponte dismiss those which are frivolous, fail to state a claim or which sue defendants entitled to immunity.

Noting that there are conflicting rulings between the circuits on whether § 1915(e)(2) applies to suits where the plaintiff prepaid the filing fees and did not seek IFP status, the court held in this case that it did not apply. The court held that while *McGore v. Wrigglesworth*, 114 F.3d 601 (6th Cir. 1997)[PLN, Sep. 1997] suggested otherwise, that was merely dicta and not controlling law.

This case was filed by a non prisoner who prepaid the filing fee. The district court dismissed the suit after screening it under § 1915(e)(2). The appeals court vacated and remanded.

"We conclude that 28 U.S.C. § 1915(e)(2) is inapplicable to actions that are not pursued in forma pauperis." The court held that by its terms, § 1915(e)(2) applies only to IFP suits. There is a circuit conflict on this issue which makes it ripe for supreme court review. Until that happens, litigants who prepay the filing fees and have their lawsuits dismissed by the court under § 1915(e)(2) should research the law applicable in their circuit. See: *Benson v. O'Brian*, 179 F.3d 1014 (6th Cir. 1999). ■

# America's Toughest Sheriff Settles for \$8.25 Million in Wrongful Death Suit

In 1996 Scott Norberg was arrested for assaulting a Mesa, Arizona police officer and booked into the Maricopa County Jail, which is run by "America's Toughest Sheriff" Joe Arpaio. The next day Norberg, 35, was choked to death by deputies while strapped in a metal restraint chair. The county medical examiner's office ruled that Norberg's death was the accidental result of "positional asphyxia."

An internal investigation conducted by Arpaio's criminal and internal affairs officers concluded that jailers were justified in handcuffing Norberg, zapping him with a stun gun, gagging him with a towel and shoving his head down into his chest "for the purpose of maintaining security and control in the face of Norberg's violent outburst."

The Norberg family filed a \$20 million wrongful death suit in April, 1998. The suit charged that more than a dozen jail guards participated in beating Norberg, a former Tempe High School athlete, before killing him by crushing his larynx.

The suit further alleged that county officers participated in a cover-up and the medical examiner's office destroyed evidence of a beating.

On January 7, 1999 the county and its insurance carrier paid \$8.25 million to settle with the Norberg family. Arpaio called the county's insurance company "gutless" for settling the suit.

"We were looking to go to trial and tell the true story," Arpaio told the *Associated Press*. He said that Norberg caused his own death by thrashing about during a violent drug-induced psychosis.

But pretrial depositions obtained by the Norberg family attorney, Michael Manning, present a markedly different version of the truth. Jail guard Patricia Duran provided a sworn statement that another jailer, David Gurney, attacked Norberg without provocation and was "the cause of the whole thing."

Another jailer, Kimberly Walsh, testified that when she warned jailers who were choking Norberg that he was no longer breathing, one of them responded, "Who gives a shit?" She said Norberg's

face turned purplish blue, he kicked spasmodically once, and died.

In another deposition Rab Choudry, who was a prisoner in the jail at the time, said that guards "kicked, hit, whatever they could do to inflict pain on this man." At least a half dozen other prisoners who witnessed the killing offered similar accounts, some saying flatly that guards murdered Norberg.

Forensic reports and autopsy photos obtained by Manning show massive bruises all over Scott Norberg's body as well as nearly two dozen burn marks from electric stun guns. But other key evidence, Norberg's larynx and x-rays of his skull, had disappeared from the County Medical Examiner's Office.

Manning retained Dr. Heinz Karnitschnig, former Maricopa County medical examiner, to examine the autopsy photographs. Karnitschnig said the photos showed that Norberg's larynx suffered "blunt force trauma." He sharply criticized Medical Examiner Philip Keen who he says told him that Norberg's larynx was discarded after his office had determined the cause of death as accidental.

"Having run the Medical Examiner's office for 21 years," Karnitschnig told the *Arizona Republic*, "I did not find Dr. Keen's explanation plausible, as I know full well that tissue samples in high profile cases such as Scott Norberg's would always be kept for several years, no matter how the office classified the matter of death."

Jack McIntyre, an Arpaio spokesperson, said that medical examiner's office staff told him that they did not know what happened to the larynx and the missing X-rays.

Two weeks after the \$8.25 million settlement in the civil suit, County Attorney Rick Romley announced that his office would launch a criminal investigation.

To date no criminal charges have been filed. Arpaio, who spent 25 years as a federal narcotics agent, contends that the criminal investigation is politically motivated, the result of his long-running

feud with Romley over jail funding and other issues. ■

Sources: *Associated Press*, *The Arizona Republic*, *The Arizona Daily Star*

## Delay in Treating Injured Shoulder States Claim

A federal district court in Pennsylvania held that prison officials delaying treatment for a prisoner's dislocated shoulder states a claim under the Eighth amendment.

On July 30, 1997, Daniel Petrichko, a Pennsylvania state prisoner, dislocated his shoulder when another prisoner pushed him into a pole. Petrichko immediately sought medical attention which was denied. His repeated requests for medical care went unanswered.

Petrichko did not receive diagnostic x-rays and painkillers until September 19, 1997. He did not receive actual treatment for the shoulder injury until October 29, 1997, when a bone specialist told him he had sustained permanent injury to his shoulder as a result of the delay in treatment.

Petrichko filed suit in federal court claiming that the delay in treatment violated his Eighth amendment right to be free from cruel and unusual punishment. The defendants filed a motion to dismiss for failure to state a claim upon which relief could be granted, Fed.R.Civ.P. 12(b)(6). The court denied the motion.

Under *Estelle v. Gamble*, 429 U.S. 97, 97 S.Ct. 289 (1976), prisoners have an Eighth amendment right to the treatment of their serious medical needs. The court held that in this case Petrichko had adequately alleged a serious medical need. The court also held that Petrichko had adequately alleged "deliberate indifference" by the prison official defendants because they knew about his injuries and refused to ensure he received timely, adequate medical treatment.

Readers should note that this is not a ruling on the merits. See: *Petrichko v. Kurtz*, 52 F. Supp.2d 503 (ED PA 1999). ■

## "Three Strikes" Provision of PLRA Unconstitutional

A federal district court in Arkansas held that a prisoner had standing to challenge the "three strikes" provision of the Prison Litigation Reform Act (PLRA) on equal protection grounds, and that "strict scrutiny" analysis applied. As a result, the provision was declared unconstitutional.

In April 1997, Arkansas state prisoner Wendell Ayers filed a 28 U.S.C. § 2254 petition for writ of habeas corpus. He was granted in forma pauperis status, and he sought declaratory and injunctive relief for alleged due process and equal protection violations during the parole hearing process.

A year later, the court construed Ayers' petition as a 42 U.S.C. § 1983 civil rights complaint and appointed counsel. The defendants promptly moved to dismiss pursuant to § 804 of the PLRA, which is encoded as 28 U.S.C. § 1915(g) and is commonly known as the "three strikes" provision.

In essence, the provision prevents prisoners from bringing civil rights actions in forma pauperis in federal courts, if they have had three or more federal proceedings dismissed as frivolous, malicious or failing to state a claim. Ayers has had four such qualifying actions.

In his opposition, Ayers raised four grounds, but only one was significant. He argued that § 1915(g) imposed an unconstitutional infringement on his fundamental right of access to courts by denying him equal protection of law.

As a threshold matter, the court examined Ayers' standing to challenge the constitutionality of the provision. Since Ayers had insufficient funds or assets to pay the \$150 filing fee, the court concluded that he had standing.

In analyzing the constitutionality of § 1915(g), the court determined that "strict judicial scrutiny" was the appropriate standard of review because the right affected by the "three strikes" provision was "fundamental." This type of analysis requires the government to advance a "compelling interest," which must be "narrowly drawn" to achieve its objective.

For the purpose of this analysis, the court assumed that deterring frivolous

filings in federal court was a "compelling interest." However, it determined that § 1915(g) was "too broad and yet, at the same time, too narrow to serve the government's stated purpose. It is too narrow in that it does nothing to reduce the frivolous filings of non-indigent prisoners; ... [it] is too broad in that it may bar non-frivolous actions of indigent prisoners." For instance, § 1915(g) "makes no provision for the merits of an indigent prisoner's filings; it does not even grant courts the discretion to hear claims that are clearly meritorious."

While the court acknowledged that five federal appellate courts have rejected equal protection challenges to § 1915(g), the court noted that those decisions were predicated on the premise that access to court is not a fundamen-

tal right. Hence, the provision was only subjected to the lower, "rational basis" analysis.

The court distinguished "a similar, although not identical, challenge to section 1915(g)," which was recently rejected by the Eighth Circuit in *Murray v. Dosal*, 150 F.3d 814 (1998). Furthermore, the court criticized the tortured ad hoc reasoning of the Eighth Circuit as being ignorant of "the realities of prison life."

The court concluded that § 1915(g) was simply not narrowly tailored to serve the government's stated purpose in enacting the provision. Therefore, § 1915(g) was declared unconstitutional under the equal protection component of the Fifth Amendment's Due Process Clause. See: *Ayers v. Norris*, 43 F.Supp.2d 1039 (E.D. Ark. 1999). ■

### Prison Realty Hires PR Firm

Nashville-based Prison Realty Trust, the parent company of Corrections Corp. of America (CCA), has hired a leading public relations firm to improve its image.

In Sept. 1999 Prison Realty retained Los Angeles-based Sitrick & Co., which specializes in crisis management. Sitrick will handle Prison Realty's media relations and communications with investors and stock analysts.

Prison Realty has faced negative media attention due to escapes and riots

at CCA facilities, and is presently facing almost a dozen shareholder suits for allegedly withholding financial information [PLN, Nov. 1999].

Sitrick & Co. was founded by Michael Sitrick, author of *Spin: How to Turn the Power of the Press to Your Advantage*, and has handled high-profile PR problems for other large corporations. ■

Source: *The Tennessean*

### Florida State Prison Halloween Melee

According to a report in *The Orlando Sentinel*, six Florida State Prison guards were injured during a Halloween incident at Florida State Prison.

The disturbance began when FSP prisoner William Stiles set his mattress on fire. Other prisoners complained of respiratory problems because of the smoke and guards began evacuating them while the fire was extinguished.

As they filed into a recreation yard, an unnamed prisoner pulled a shank and began striking at guards, according to *The Sentinel*. Several other prisoners began

climbing a fence but were stopped when guards fired two warning blasts with shotguns.

Eleven prisoners were reportedly placed in segregation for their involvement in the disturbance. There was no report of prisoner injuries.

According to *The Sentinel*, Sgt. Fred Wright, the most seriously injured guard, received treatment for a stab wound in the arm. ■

Source: *The Orlando Sentinel*

## Constitutionality of ADA Upheld by Fourth Circuit

In the September, 1998, issue of *PLN* we reported *Amos v. Maryland Department of Public Safety*, 126 F.3d 589 (4th Cir. 1997) in which the court held that the Americans with Disabilities Act (ADA), 42 U.S.C. § 12131-12165 and the Rehabilitation Act (RA), 29 U.S.C. § 794, did not apply to state prisons. The supreme court vacated the ruling and remanded it, at 118 S.Ct. 2339 (1998), to the appeals court for reconsideration in light of *Pennsylvania Department of Corrections v. Yeskey*, 524 U.S. 206, 118 S.Ct. 1952 (1998) [*PLN*, Sep. 1998].

On remand, the Fourth circuit duly accepted the supreme court's determination that the ADA and RA apply to state prisons. The court also concluded that the ADA and RA are constitutional and do not exceed the constitutional limits on congressional power. The court also held that congress had abrogated the states' sovereign immunity from suit by enacting the ADA and RA.

The suit involves 13 disabled Maryland state prisoners who claimed their conditions of confinement violate both the ADA and the RA because they are not provided with the same access to prison programs and opportunities available to able bodied prisoners.

The court gives a detailed discussion to section five of the Fourteenth amendment to the constitution which gives congress the power to enact legislation to remedy or prevent equal protection violations. "Having examined, among other things, the statute itself, portions of the legislative history, and the opinions of our sister circuits that have addressed the issue.... we hold that congress did not exceed its authority under § 5 of the 14th amendment when it enacted the ADA to remedy discrimination against disabled persons, including disabled state prisoners."

The court also declined to follow *Gates v. Rowland*, 39 F.3d 1439 (9th Cir. 1994) [*PLN*, June, 1995] which imposed the *Turner v. Safely*, 482 U.S. 78, 107 S.Ct. 2254 (1987) "reasonableness" test on ADA claims by prisoners. "For us to graft the standards for review of prisoners' constitutional claims onto these statutes would be for us essentially to rewrite what the supreme court has deemed to be un-

ambiguous statutory language, see *Yeskey*, 118 S.Ct. at 1953, we cannot engage in such a practice." This is extremely important because it follows the established principle that statutes can provide more protection than the constitution, which is simply the "basement" of minimal rights afforded to citizens. However, in this case the court did not say what standard of review it would employ to determine if prison conditions violated the ADA and RA.

The court held that the Department of Justice regulations involving application of the ADA and RA to prisoner and jails are constitutional and also within congressional authority. See: 28 C.F.R. § 35.151.

### Cell Feed Status May Give Jailer Actual Notice of Need to Protect Prisoner

The First Circuit has held that the fact a jail supervisor knew a prisoner was on cell feed status may have given him actual notice of the prisoner's protective custody status when he placed the prisoner in a holding cell where he was assaulted by another prisoner.

Shawn Giroux was a prisoner at the Somerset County (Maine) Jail. Initially housed in a four-man cell block, Giroux was moved when another prisoner, Robert Tucker, threatened him.

The fact that Giroux was placed on cell feed status, which only occurs for medical or protection reasons, was noted on the jail roster. Giroux and Tucker had overlapping visits in a communal visitation room. Following the visits, Sgt. Hartley placed Giroux, Tucker, and another prisoner in a holding cell. Tucker had an argument with the other prisoner who was removed from the holding cell. Tucker then attacked Giroux, breaking his nose, tearing his shoulder ligaments, and causing a head laceration that required stitches. Hartley was nearby and broke up the fight.

Giroux filed a civil rights suit under 42 U.S.C. § 1983 in federal district court alleging that Hartley violated his Eighth Amendment rights when he failed to protect him and the sheriff and county failed to properly train Hartley.

Finally, the court held that congress abrogated the states' Eleventh amendment immunity from suit by its citizens when it enacted both statutes. The case was remanded to the district court for resolution of the plaintiffs' claims on the merits.

Readers should note that there is a split within the circuits on the standard to be used when reviewing prisoners ADA and RA claims. Until the supreme court resolves the issue, readers litigating the issue should research the standard used in their circuit. See: *Amos v. Maryland Dept. of Public Safety*, 178 F.3d 212 (4th Cir. 1999). ■

The district court granted the defendants' motion for summary judgment holding that Giroux failed to prove Hartley had actual knowledge of Giroux's protective custody status and that Tucker was the prisoner who threatened him.

The First Circuit reversed the district court's dismissal. Hartley admitted that, as jail shift supervisor, it was his duty to read the jail roster before he started his shift. The court held that the notation on the jail roster of Giroux's cell feed status and the description of Hartley's duties by Hartley and other jail personnel created a material fact issue on the extent of Hartley's responsibilities.

It is possible that Hartley was responsible for determining why Giroux was on cell feed status. If so, his placement of Giroux in such a perilous situation was severe dereliction of duty which rises to the level of deliberate indifference and is actionable under § 1983. The First Circuit reversed the dismissal, noting that it also did not agree with the district court's conclusion that the liability of the sheriff and county depended on Hartley being liable for a constitutional violation. The case was returned to the district court for further proceedings. See: *Giroux v. Somerset County*, 178 F.3d 38 (1st Cir. 1999). ■

# New Jersey Sex Offender Porn Ban Upheld

In the May, 1999, issue of *PLN* we reported *Waterman v. Verniero*, 12 F. Supp. 364 (D NJ 1998) where a federal district court preliminarily enjoined a New Jersey law banning sexually oriented material from a sex offender treatment prison. The same article also reported *Waterman v. Verniero*, 12 F. Supp.2d 378 (D NJ 1998) where the court converted its earlier ruling into a permanent injunction. The court of appeals for the Third circuit reversed and remanded the case with instructions for the trial court to enter judgment in favor of the defendants.

In 1998 the New Jersey legislature unanimously enacted NJSA 2C:47-10 which bans possession or viewing of all "sexually oriented" materials at the Adult Diagnostic Treatment Center (ADTC) in Avenal. The ADTC is a prison operated by the New Jersey Department of Corrections (DOC) for the sole purpose of treating and rehabilitating "repetitive and compulsive" sex offenders, mainly pedophiles. The statute in question does not apply to any other New Jersey prisons.

The district court held that the statute was unconstitutionally vague and overbroad and was not rationally related to any legitimate penological objectives. The New Jersey DOC appears to have cured the vagueness and over-breadth problem by promulgating administrative rules, NJAC 10A-18-9.1 (1999) limiting the scope of the statute.

This appears to be a case where the appeals court decided it would reverse a highly unpopular lower court ruling and tailor its legal analysis accordingly. (The district court's second ruling in this case notes the public and media outrage and exhortation it endured for issuing the Preliminary Injunction in this case.) Apparently the appeals court did not want to face the same criticism by affirming the lower court.

At the outset, the court held it would analyze the plaintiffs' vagueness and over-breadth claims under the *Turner v. Safley*, 482 U.S. 78, 107 S.Ct. 2254 (1987) "reasonableness" standard. The court held that "if the challenged statute withstands review under *Safley*, it does not violate the constitution." This directly conflicts with other, post *Turner*, rulings from other circuits that hold a different

analysis must be employed in vagueness and over-breadth challenges to prison rules. See: *Rios v. Lane*, 812 F.2d 1032 (7th Cir. 1987) and *Wolfel v. Morris*, 972 F.2d 712 (6th Cir. 1992).

The court held that the statute in this case was rationally related to the state's legitimate interest in rehabilitating sex offenders. The court held that the lower court had erred by relying on the legislative history to find that "the true reason for the enactment of NJSA 2C:47-10 appears to be public outrage over some of the heinous, pedophilic crimes that occurred in New Jersey." Essentially, the appeals court held that courts should accept at face value any pretextual or post hoc justifications given for statutes that abridge the First amendment rights of prisoners even when the public record is replete with the legislature's actual motives in enacting a given statute.

While the district court accepted the testimony of the plaintiffs' expert witness that banning sexually oriented material does not materially advance the rehabilitation of sex offenders, the appeals court held this was wrong as it substituted the district court's judgment for the legislatures. The court noted that in *Amatel v.*

*Reno*, 156 F.3d 192 (DC Cir. 1998)[*PLN*, Sept. 1999] the District of Columbia circuit had reached a similar conclusion about a federal statute which banned materials depicting nudity from federal prisons. The court did not mention that in *Amatel* the court remanded the case to the district court for consideration of the prisoners' claim that the federal statute was vague and overbroad.

"In sum, having analyzed the statute under the four prong test announced in *Safley*, we conclude that NJSA 2C:47-10 is reasonably related to legitimate penological interests.... and find that the district court erred in concluding otherwise." The case was remanded with instructions to dismiss. See: *Waterman v. Farmer*, 183 F.3d 208 (3rd Cir. 1999). ■

## California Prison Focus

*Prison Focus* is the quarterly publication of California Prison Focus, a nonprofit organization that works with and on behalf of prisoners in California's control units. Each issue contains reports on Pelican Bay State Prison, Corcoran State Prison, Valley State Prison for Women and other prisons. Other sections include Current News, Legal Desk, Resources and Book Reviews.

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# New York Parole Board Commissioner Convicted

## Federal Inquiry Continues

by Julia Lutsky

In April of 1996 John Kim walked out of prison on parole; he had been sentenced four years earlier to four to twelve years for armed robbery. His father, Nam Soo Kim, pastor of one of New York City's largest Korean congregations, had contributed several thousand dollars to Governor George Pataki's campaign coffers in 1995. The families of two other Korean prisoners made contributions of \$12,000 and \$9,500 each to Pataki's campaigns. They were not so lucky, however; their sons were not released. The parents of one of these visited the offices of Zachary Carter, then federal prosecutor in Brooklyn, causing the initiation of a federal investigation which has resulted in the August 3<sup>rd</sup> 1999 conviction of New York State Parole Commissioner Sean McSherry. McSherry, 47, from Chester and a former Bronx prosecutor, had been the lead official on the three-member panel of the Parole Board that ordered John Kim's release over the objections of Queens prosecutors [PLN, May, 1999].

When McSherry was indicted for lying, perjury and obstruction of justice in October of 1998, Ronald Hotaling, then secretary to the Division of Parole Chairman, was arrested and charged with giving misleading information to a grand jury and to a deputy in the federal investigation. Hotaling, who had left the Division of Parole in 1996, pleaded guilty in August of this year after cooperating with federal prosecutors during McSherry's trial. It was he, according to Assistant US Attorney Anthony Macht, who transmitted instructions to McSherry. McSherry "deliberately lied when he told federal authorities that the early release of a violent gang member was not influenced by politics, [the] prosecutor said... 'He invented whole conversations... In short, he told big fat lies.'"

McSherry was convicted by a 12 woman federal jury in Brooklyn of federal charges including perjury and obstruction of justice. He was sentenced to two years in prison. His lawyer, Diarmund White, said that he would appeal because he said his client "had been pressured into making misstatements, but [had]

never intentionally lied." Pataki spokesman, Michael McKeon, accused the federal prosecutors of "using [the] trial to embarrass the governor."

During his own trial Hotaling suggested that the Pataki appointed chairman of the Parole Board, Brion T. Travis, "told him of 'the interest of the Governor's office in the release' of [a] felon." Travis had been chairman of the parole board panel that approved the release of two Israeli drug dealers in 1996 before they had completed their minimum sentences. The New York State Parole Board has been revamped in the past several months, several state officials reported to the *New York Times*, and Travis' role in day to day operations has been reduced. "Thomas Grant, a spokesman for Mr. Travis, would not comment on Mr. Travis' job."

Yung Soo Yoo, the Republican fund raiser for Pataki who had suggested the original \$1,000 donation Nam Soo Kim made to Pataki's campaign in 1995, and Patrick Donahue, one of Pataki's top campaign aides and presently his campaign finance director, were also targeted for grand jury investigation but they have not yet been charged. The federal inquiry includes as well the case of Rabbi Shlomo Helbrans, released in 1996 after being convicted in 1994 of kidnapping a teenager that same year. Prosecutors allege "that a parole officer 'took steps to facilitate the release' of Rabbi Helbrans because the official felt 'improper political pressure' being brought on the rabbi's behalf"; and that such pressure might have been exerted by Leon Perlmutter, "an influential rabbi, who has assisted the Pataki campaign in raising money from Orthodox Jews." [New York Times, 8/19/99]

There is no indication that the Governor was involved in any of the parole decisions, but he did meet Incha Chung, the mother of Boyoung Chung, who was convicted of murder. She had given \$9,500 to Pataki's campaign to speed her son's release, so when she met the Governor at a fund raiser, she whispered to him that she was "waiting for news." According to the *NY Times*, "The governor ... replied

that he did not know what she was talking about and walked away." ■

Sources: *The New York Post*, 8/30/99; *The Times Herald-Record*, Middletown, New York 8/3/99, 8/4/99; *The New York Times* 8/19/99

## PLRA Administrative Remedy Exhaustion Requirement Not Retroactive

The Second Circuit has held that the Exhaustion of Administrative Remedies requirement of the Prison Litigation Reform Act (PLRA), 42 U.S.C. § 1997e(a), does not apply to suits pending prior to the PLRA's enactment.

Abdullah Y. Salahuddin, a New York state prisoner, filed a civil rights suit under 42 U.S.C. § 1983, alleging that a guard violated his First Amendment rights when he twice prevented Salahuddin from meeting with a prison chaplain. After the suit was filed, the PLRA was enacted. The district court dismissed the suit for failure to exhaust administrative remedies, as required by the PLRA. Salahuddin appealed.

The Second Circuit held that, pursuant to *Landgraf v. USI Film Prods.*, 511 U.S. 244 (1994), it should first determine "whether Congress has expressly prescribed the statute's proper reach." The court held that because it states that no action "shall be brought," not that no action "shall be maintained," the express terms of the amended § 1997e(a) state that it "does not apply to actions pending as of the Act's effective date." Because this case was pending on the effective date, the district court should not have applied the amended § 1997e(a). All the other federal circuit courts that have considered this issue—including the Sixth, Ninth, and Tenth Circuits—have held likewise. *Wright v. Morris*, 111 F.3d 414 (6th Cir. 1997); *Bishop v. Lewis*, 155 F.3d 1094 (9th Cir. 1998); *Garrett v. Hawk*, 127 F.3d 1263 (10th Cir. 1997). The case was reversed and returned to the district court for further proceedings. See: *Salahuddin v. Mead*, 174 F.3d 271 (2nd Cir. 1999). ■

## Whitestone Foundation

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Whitestone Foundation exposes programs designed to warehouse sex offenders. Since organizing in 1998, Whitestone has gained national attention. Our missions: 1) provide critical analysis of civil commitment programs designed to re-incarcerate criminals in indefinite confinement (touted as mental health treatment), and 2) educate how restorative justice principles apply to sex offenders.

Whitestone was founded in Washington, the first state to develop sex offender civil commitment in 1990 (RCW 71.09). Civil rights litigation has forced costs of incarceration in Washington's program to over \$400,000 per resident per year!

Such laws as 71.09 prove current public policy moves to stigmatize and vilify certain criminals, broadening the sanctions on this offender type to prolonged and indefinite punishment, shifting mission from rehabilitation to vengeance toward

some offenders. Nothing stops the lawmakers from targeting other criminals, too. Washington state just passed civil commitment for substance abusers (RCW 72.09).

Whitestone Foundation produces a monthly newsletter addressing the practices of local and national civil commitment schemes, rulings on legal challenges of these laws, and any news that might impact public policy as it relates to the civil commitment of sex offenders. Newsletter rates are \$10.00 per year. Whitestone does not offer legal advice, but we do have an 89 page list of case law/writings focused on civil commitment of sex offenders, also available for \$10.00. Whitestone is a grassroots non-profit. Unfortunately, we cannot offer free subscriptions.

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## Nine Florida Guards Injured in Scuffle

Heightened tensions between prisoners and guards stemming from the July beating death of Frank Valdes at the hands of Florida State Prison guards may have contributed to a September clash between prisoners and guards at the Union Correctional Center in Raiford.

According to prison officials, six guards were handcuffing Lamar Miffin, 29, near the recreation yard after he had reportedly exposed himself and masturbated. Officials say Miffin grabbed a chunk of concrete to use against guards as they approached him.

Sources inside Raiford told *PLN* that it was unclear what Miffin had done, "whether the catalyst was gunning, but he was doing something in the sallyport of D Area in the SW Unit, possibly gunning [exposing himself to] a female guard in the control room.

"Anyway, the guards tried to corral [Miffin] and he took off around the back of the chow hall by the yard where they

caught him. It was about 10 am at the time, and about eight guards jumped him, some 300 pounders, too."

According to official sources about 20 prisoners from the adjoining rec yard scaled a fence and attacked the six guards who were cuffing Miffin. Reinforcements were called and shortly after they arrived most of the combatant prisoners melted back into a crowd of about 300 onlookers, officials say.

*PLN's* inside source said that while the initial group of guards "piled onto [Miffin], the guys on the rec yard unleashed a volley of rocks. As the artillery rained down ... the rec gang pulled up the bottom of the fence and three [prisoners] scurried under and attacked. Even though they were outnumbered, [the three prisoners] proceeded to wear the [guards] out. The 300 pounders were cowering like wimps." Before reinforcements arrived the three prisoners "hightailed it back under the fence where they blended

into the crowd. They were not captured until the next day after the rats did their duty."

According to Warden Dennis O'Neill, nine guards suffered minor injuries, including one who took stitches for a head wound, and one prisoner suffered a broken hand. O'Neill said that twelve prisoners who were identified by guards as having participated in the incident were placed in solitary confinement by extraction teams without incident.

O'Neill acknowledged that tensions were heightened after the Valdes beating. He told the *Fort Lauderdale Sun-Sentinel* that "you are dealing with a population that, no matter what they may have done personally, has a very keen sense of indignation." ■

Sources: *Ft. Lauderdale Sun-Sentinel*, Reader Mail

## Oregon DOC Liable for Attacks by Parolees

The Oregon Court of Appeals upheld a trial court judgment against the Department of Corrections (DOC), concluding that violent crimes committed by a parolee were a reasonably foreseeable consequence of inadequate parole supervision.

In 1984, Cal Brown was convicted of assaulting an Oregon woman. At that time, he had an extensive criminal record, including a 1977 conviction involving a knife assault on a California woman.

When Brown was paroled in 1991 he was classified as requiring the highest level of supervision. He was placed under the supervision of a DOC parole officer who specialized in supervision of sex offenders because his criminal record involved "potentially sexually predatory behavior."

The parole officer was aware of Brown's history of "sexually predatory and physically assaultive conduct towards women and his sexual fantasies regarding female bondage and violence

toward women." He also knew that Brown had a history of absconding from supervision.

Within two months of being paroled, Brown absconded and kidnapped a Washington woman. He raped, sodomized and tortured her for 36 hours before stabbing her several times and leaving her to die in the trunk of a car.

Brown then traveled to California where he attacked another woman with a knife. After raping and torturing her, Brown temporarily left the hotel they were staying in and she escaped. He was arrested when he returned to the hotel. He pleaded guilty to the California charges and was later convicted of murder and sentenced to death in Washington.

The California woman and the family of the Washington woman brought suit

against the DOC, alleging that it was negligent in its supervision of Brown. The trial court agreed and awarded damages.

On appeal, the DOC did not dispute that its supervision of Brown was inadequate. It argued, instead, that "the trial court erred in holding it liable under general foreseeability principles, because Brown's intervening intentional criminal actions precluded such liability."

The court disagreed, concluding that the DOC "had reason to foresee that Brown, if inadequately supervised, was likely to engage in violent sex crimes." The court also concluded that the "harm that plaintiffs suffered was a reasonably foreseeable consequence of defendant's inadequate supervision of Brown." See: *Washa v. DOC*, 979 P.2d 273 (Or.App. 1999). ■

## Miscarriage is Serious Medical Condition

A federal district court in Maine held that a miscarriage is a serious medical condition, but dismissed a state law medical negligence claim for failure to comply with the pre-suit screening requirements of the Maine Tort Claims Act (MTC).

On June 13, 1996, Melissa Ferris was booked into the Kennebec County (Maine) Jail. The following evening Ferris complained to jail nurse Sprowl that she was having a miscarriage. Sprowl, who was employed by Allied Resources for Correctional Health (ARCH), failed to provide meaningful treatment, and within hours Ferris miscarried.

Initially, Ferris brought suit in state court against the county, ARCH, Sprowl and two jail guards, but the action was promptly removed to the federal forum. In her amended complaint, Ferris asserted three counts: (1) a civil rights violation, (2) medical negligence, and (3) negligent infliction of emotional distress. This opinion is limited to Sprowl's motion to dismiss.

The court easily rejected Sprowl's defense of failure to state a claim, finding that Ferris's medical condition "was plainly serious," and noting that "Sprowl apparently made no effort to assess or treat" Ferris, beyond some cursory maneuvers. The court recognized that

"clearly inadequate" treatment is tantamount "to a refusal to provide essential care."

The court similarly rejected Sprowl's qualified immunity defense. Although Sprowl acknowledged the right to adequate medical care was clearly established, she argued "that a reasonable person in her position would not have understood" that her treatment of Ferris was substandard. The court found this contention to be plainly untenable.

Sprowl also argued that Ferris failed to comply with the procedural requirements of the MTC. The court found that even though Ferris provided proper notice of claim and acted timely in filing suit, she neglected to comply with the pre-litigation screening requirement mandated for actions of professional negligence. As a result, the medical negligence claim was dismissed, but the negligent infliction of emotional distress claim was allowed to proceed.

Lastly, Sprowl argued that Maine law precluded Ferris from suing both her and ARCH simultaneously, asserting the same claims. The court found that although this was once a valid theory, modern pleading permits joint and several liability claims against both a master and servant. See: *Ferris v. County of Kennebec*, 44 F.Supp.2d 62 (D.Me. 1999). ■

### Inmate Classified

## Indigence is Cause to Retax Costs

The court of appeals for the Ninth circuit held that a district court abused its discretion in denying a motion to retax costs when the losing plaintiff was indigent and the effect of taxing costs against the plaintiff would chill future civil rights claimants.

This non prison case arose when a woman basketball coach was fired after complaining about being paid less than her male colleagues. She filed a discrimination suit which she lost on the merits. The district court then taxed her with \$46,710.97 in costs after determining the defendants were the prevailing party.

The court of appeals affirmed the case on the merits but held that the district court had abused its discretion in taxing the costs against the plaintiff. Fed.R.Civ.P. 54(d)(1) allows for costs, other than attorney fees, to be paid to the prevailing party. The rule creates a presumption that the prevailing party will be awarded costs unless the losing party can demonstrate why costs shouldn't be awarded.

Attorneys general in various states, Washington and Michigan in particular, frequently seek costs against losing prisoner plaintiffs in order to retaliate against those plaintiffs and deter other prisoners from filing suit. [*PLN*, June, 1993, "How to Defend Against a Bill of Costs"] This ruling will be useful to prisoner litigants seeking to avoid being taxed with the defendants' costs.

"District courts should consider the financial resources of the plaintiff and the amount of costs in civil rights cases .... Stanley's argument that payment of the costs would render her indigent is compelling. Indigence is a factor that a district court may properly consider in deciding whether to award costs." The court held that the pertinent time frame is when the lower court actually taxes the costs, not the plaintiff's financial situation later.

"Furthermore, the imposition of such high costs on losing civil rights plaintiffs of modest means may chill civil rights litigation in this area. While we reject Stanley's claims, we note that they raise important issues and that the answers were far from obvious.

"Without civil rights litigants who are willing to test the boundaries of our laws, we would not have made much of the progress that has occurred in this nation since *Brown v. Board of Education*...." The case was remanded to the

### Notice of Summary Judgment Requirements Mandatory

The U.S. court of appeals for the Second Circuit held that it is inappropriate to enter summary judgment against a pro se litigant if there is no indication that the litigant understands the requirements for summary judgment.

In 1995, Stanley McPherson was a state prisoner confined to the Orleans Correctional Facility in New York. When his mother died, McPherson's brother contacted the Orleans chaplain's office to arrange for his transportation to New York City for the funeral. However, Orleans deputy superintendent R.J. Kirby denied the request.

In 1997, McPherson sued Kirby and three other prison officials for violating his Eighth Amendment rights. Significantly, he sought a "restraining order of retaliation," in addition to damages.

Early in the proceedings, the district court issued a sua sponte order dismissing all claims, except those against Kirby. Eventually, Kirby moved for summary judgment, and his motion was duly supported by an affidavit listing plausibly valid reasons for denying McPherson's request.

In his opposition, McPherson alluded to affidavits he would provide. These affidavits purportedly contradict Kirby's averments, and show that Kirby's decision was actually predicated on a retaliatory animus. However, McPherson failed to file any of these supporting affidavits with his opposition, and the district court granted summary judgment for Kirby.

In analyzing the situation, the appeals court assumed that the intentional infliction of psychological distress on a prisoner by prison officials in denying leave to attend a parent's funeral may constitute cruel and unusual punishment. Hence, the issue was reduced to whether

district court with instructions to reconsider its order taxing costs against the plaintiff. See: *Stanley v. University of Southern California*, 178 F.3d 1069 (9th Cir. 1999). ■

genuine issues of material fact supported McPherson.

The appellate court recognized that "it is not obvious to a layman" that "he must file his own affidavits contradicting his opponent's if he wants to preserve factual issues for trial." Since neither the district court nor the defendants provided McPherson with notice of this requirement, and because there was no indication that McPherson was otherwise aware of the procedure, it was determined that the district court erred in granting summary judgment against McPherson.

The court concluded that, "absent a clear indication that the pro se litigant understands the nature and consequences of Rule 56 ... he or she must be so informed by the movant or ... the district court." The summary judgment was reversed. See: *McPherson v. Coombe*, 174 F.3d 276 (2nd Cir. 1999) ■

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Address the news items to *PLN's* editors, addresses listed on page two. Do not send monetary donations to *PLN's* editors. All donations should be addressed separately to *PLN's* Seattle office.

## News in Brief

**Brazil:** More than 40 prisoners escaped from a jail in Sao Paulo on August 15, 1999 after twenty men overpowered, beat and tied up the guards and unlocked the cell doors. A shoot-out with police left one of the jailhouse liberators dead.

**CA:** A July 10, 1999 brawl at the Pritchess Detention Center in Saugus that involved 50 prisoners left 12 with minor cuts and bruises.

**CA:** Stan Blondek, 35, a staff psychologist at a California Youth Authority facility in Stockton, was fired and jailed in Sept. 1999 for introducing biased testimony on behalf of a convicted rapist and murderer. Blondek was found in contempt of court for providing only some of the documents related to the mental condition of prisoner Donald Schmidt, 27, during a parole hearing. Blondek admitted on cross-examination that he was not licensed by the state and that his degrees were earned from a correspondence school.

**CA:** Veteran state prison guard Dennis Leroy Armstrong, 48, charged with having sex with female prisoners at the Northern California Women's Facility in Stockton, pleaded no contest to two misdemeanors on Aug. 10, 1999. By entering into a plea agreement he avoided the maximum penalty of one year in jail. He was sentenced to probation and 160 days community service.

**CT:** A female prisoner being transported in a sheriff's van on Aug. 18, 1999 claimed she was raped after four male prisoners tore down a metal partition in the vehicle to sexually assault her. "These things happen in this type of business," said New Haven Co. High Sheriff Frank J. Kinney III. The two deputies who were driving the van remain on duty.

**FL:** On August 25, 1999, five prisoners were charged with assaulting guards at the Jasper state prison during a July 3 fight. The brawl began when prisoner Charles Jerry attacked guard Damon McLeod on a recreation yard. Six guards were injured, including Samantha Hart, 21, who was seven

to nine weeks pregnant and later had a miscarriage.

**France:** On July 28, 1999, the European Court of Human Rights, based in Strasbourg, condemned France for torture in the case of a Moroccan man who claimed he was sexually assaulted, kicked and beaten with a baseball bat while in police custody. French authorities were ordered to pay \$81,000 in damages and \$18,300 in legal costs to Ahmed Selmouni. Four police officers were convicted in connection with the Nov. 1991 incident and received suspended sentences.

**NY:** Warith Habib Abdul was freed in Sept. 1999 after serving 17 years on a wrongful rape conviction. He was cleared by DNA tests and ordered released by a federal court. His lawyer cited improper police tactics that included prompting the victim to identify Abdul months after the rape when she was initially unable to do so.

**OH:** Anthony Burton, a guard at the Cleveland City Jail, was charged with felonious assault on July 26, 1999 for scalding a prisoner with a hot liquid. City officials said Burton threw a bag of garbage and an unidentified hot liquid on prisoner Maxwell Arthur, who was taken to a hospital with first- and second-degree burns over 22 percent of his body. Burton was suspended with pay.

**OH:** Former Cuyahoga County jail guard Donnelly C. Varner, 45, was sentenced to 16 months in federal prison on July 23, 1999. Varner had been recruited as a courier in a drug operation run by former jail prisoner Joseph Adams, who had met Varner while incarcerated. During an investigation by the FBI, Varner was observed accepting two kilos of cocaine from one of Adams' suppliers. Varner was fired after being charged in July 1998.

**PA:** Pittsburgh District Justice Gigi Sullivan, 38, was indicted on October 22, 1999 on charges that she shot heroin, snorted cocaine and abused prescription drugs in her chambers before hearing cases. She is also accused of dismissing charges against her supplier, Donald Geraci, in exchange for drugs.

**RI:** Former state prisoner Allen Johnson won a \$275,000 jury award on Oct. 7, 1999; he had sued the DOC and a prison guard for failing to protect him from a 1994 attack that left him disfigured. Johnson claimed that the guard had allowed prisoner Jeffrey Link to carry out the assault.

**TN:** Former Cheatam County jailer Jeffrey Tomlin, 29, was indicted in October 1999 on 5 counts of official oppression and 5 counts of official misconduct. He is accused of allowing prisoners to fight in the jail and sometimes escorting prisoners to other locations in the facility so they could brawl.

**VA:** On August 22, 1999, a guard at the newly-opened supermax Red Onion State Prison was stabbed about eight times while delivering lunch trays. Jackie A. McCarty was attacked by prisoner Lamont Douglas, 24, who was then shot twice with rubber pellets by a guard in a gun port. Douglas was later charged with malicious wounding. ■

Kent Russell

# Legal News

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## Youngstown Case Reveals New Legal Issues for Prisoner Advocates, State Correctional Agencies and Private Prison Companies

*by Al Gerhardstein*

As the number of prisoners in private lock-ups continue to increase, lawsuits filed by them, not unexpectedly, are also on the rise. While that is no surprise to corrections professionals and litigators, what is new are some of the legal theories being pressed and the entities named as defendants. This brief article will review these developments and suggest legal strategies for plaintiffs and defendants in prisoner civil rights lawsuits involving privately owned and operated facilities. The class action brought by the Youngstown, Ohio

prisoners at Correction Corporation of America's (CCA) Northeast Ohio Correctional Center (NOCC) will be used as a case study to demonstrate some of these theories in action.

### I. Youngstown Case Study – The Problem

Youngstown, Ohio is a classic “rust-belt” community. Formerly the center of a thriving group of steel mills, the city now struggles to find meaningful jobs for a blue collar workforce. The region already had three public prisons either open or under construction in 1996 when CCA proposed construction of a 1500 bed facility. Guard positions, as they are in so many depressed areas, were viewed as good jobs so an economic development package was quickly negotiated with the city. The agreement transferred 100 acres and granted tax abatements for ten years to CCA in exchange for a “medium security” prison that would employ approximately 350 local residents with an estimated annual payroll of eight million dollars. The forty-seven million dollar prison was constructed in approximately nine months.

No Ohio state law regulated private prisons at the time. The Ohio Department of Rehabilitation and Correction (ODRC) had no role in siting, designing, or establishing standards for the prison's operation. In restricting most hires to local residents, the resulting workforce proved to be very inexperienced. The doors opened on May 15, 1997 following

the signing of a temporary contract between CCA and the Government of the District of Columbia. The first 900 D.C. prisoners were transferred to NOCC in just seventeen days. Although, the employees had participated in a four week training program, most had never seen an prisoner before the prison opened. Those employees would have a rude awakening.

The prisoners who arrived were not all “medium security” men. In fact, the D.C. government used the opening of NOCC as an opportunity to transfer nearly 200 of its most disruptive prisoners from the troubled complex in Lorton, Virginia. Moreover, hundreds more were transferred directly to NOCC from the Maximum Security Facility at Lorton. The contract between CCA and D.C. called for a “transfer packet” to be provided to CCA seven days before a prisoner was presented in Ohio for incarceration. This was intended to serve as a vehicle by which CCA could check classification.

No packets were sent; no one checked the classification of the men to insure that they were medium security; and CCA did not complain. By the end of October, the prison had 1700 D.C. prisoners. Nearly 200 of those men were subject to separation orders. CCA did not protest or complain about the “separates”. Rather, the company welcomed all arrivals from D.C.

The Youngstown development agreement did not call for any monitoring by local officials of activity in the prison.

## Inside

From the Editor	8
Pro Se Tips and Tactics	9
Corcoran Guard Acquittal	12
Megan's Law Fallout	14
Book Reviews	15
Washington 35% Suit Update	17
Washington Censorship Suit Settled	18
New Folsom Lockdown	20
Michigan PLN Suit Settled	21
Michigan Women's Suit Gutted	22
PLRA Atty Fee Cap Struck Down	23
Sign Language Interpreters	26
News in Brief	28

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## Youngstown (continued)

D.C. had no regular monitor at the prison during the initial months. The host state of Ohio did not monitor NOCC. Meanwhile the experienced D.C. prisoners discovered a great deal of shank material in the new facility and violence soon erupted. Numerous prisoners and one guard were stabbed in the initial months. The staff responded with chemical agents, including one episode at the end of May, 1997 when four cellblocks had chemical agents dropped on them from openings in the roof.

The prison was filling so rapidly that necessary records, including medical records, often failed to be delivered with the men. At one point in September, 1997, 400 prisoners were incarcerated at NOCC without any medical records from the sending agency. Many of these men suffered from complicated, chronic conditions including HIV/AIDS, hypertension, diabetes, and mental conditions requiring psychotropic medications. Chronic care prisoners remained underserved for months.

As of March, 1998, twenty men had been stabbed and two were murdered by predatory prisoners. Five prisoners died of medical conditions. In the Spring of 1998, the facility was locked down and the men underwent a series of degrading strip and body cavity searches. In July, 1998, six prisoners, including five murderers escaped. One remained at large for nearly a month. The national media gravitated to the scene and reports were made on *NPR*, *All Things Considered*; *Fox Files*; *Dateline* and *Sixty Minutes*. Articles appeared in *The New York Times*, *The Wall Street Journal* and *The Washington Post* as well as in the local Ohio papers. Following the escapes, Republican Governor George Voinovich (whose brother's construction company built the facility) called for the prison to be shut down.

A class action lawsuit was filed by the prisoners ten weeks after the facility opened. The action alleged that the prison was unauthorized under Ohio law, and that CCA and Washington D.C. failed to protect the prisoners; authorized the use of excessive force by staff; provided inadequate medical care; and failed to provide programming as promised in the

contract between D.C. and CCA. Eventually the host community, Youngstown, Ohio, took the unprecedented step of joining the prisoners as plaintiffs alleging that the defendants violated the terms of the development agreement by not establishing a medium security prison.

All of the six theories of liability or legal issues summarized next in this article were either briefed or debated during the course of the lawsuit and the related effort to secure state legislation. The case was settled before any judge gave a definitive ruling on these issues. A summary of the class action settlement and the related state legislation appears near the end of this article. These legal doctrines or issues are being pressed in a number of lawsuits against private prisons that have been filed around the country.

## II. Theories of Liability & Legal Issues

### #1 – Was a “Private Prison” Authorized by State Law?

The Youngstown prisoners argued that a local municipality is without authority to establish a private prison. Although Ohio is a home rule state, an issue is not deemed “local” and therefore a subject for local government if it is a “matter of statewide concern.” *Bucyrus v. State Dept. of Health*, 120 OS 426 (1929); *Kettering v. State Employment Relations Board*, 26 OS 3d 50 (1986). The security of the Youngstown area citizens with respect to felons transported from out of state necessarily required coordination among law enforcement agencies well beyond the city limits. State wide issues arguably were implicated.

This position was bolstered by the fact that state law at the time authorized local governments to establish only jails, not prisons. Further, even under that authorizing law, local government was expressly prohibited from housing prisoners from out of state. See ORC §9.06(A). See also ORC §§1.05 and 753.03.

In addition to challenging the basic authority for the facility, the prisoners also challenged the staff's authority to use force or even detain them since the staff were not law enforcement guards under Ohio law. See ORC §§2901.01(11); 109.78. They also noted that the criminal escape

statute did not make it a crime to escape from a private prison. ORC § 2921.34. See also Kentucky Attorney General Opinion(90-115)(county may not lease prison for use by out of state prisoners since operation of prisons constitutionally mandated to state).

United States District Judge Sam Bell did not rule on this issue, preferring instead to wait for the state legislature to act. He did express his frustration:

"I am most appalled, however, with the fact that this facility, 60 percent of whose population has been convicted of some form of homicide, is erected, put into operation without the slightest thought of how the possibilities which flow from the erection of this place impact on the citizens of Ohio...I cannot imagine that we find ourselves in a position where we do not know how to handle, legally, lawfully, those who escape from this prison, if that's what this is. I cannot imagine that although the notice has been given to the legislature, that we don't have any action on this at all."

CCA argued that the prisoners had no standing to challenge the legality of the prison and that the prison was authorized under existing law. Further, while debating potential legislation in the statehouse, CCA urged that any attempt to bar private prisons in Ohio would violate both the Commerce Clause and the Contract Clause of the United States Constitution.

As a general legal proposition, a plaintiff must suffer injury based on a legally protected interest in order to have standing to challenge that deprivation. Accordingly, CCA argued that prisoners have no liberty interest in determining the place of their incarceration. *Olim v. Wakinekona*, 461 U.S. 238 (1983); *Meachum v. Fano*, 427 U.S. 215 (1976). These cases involved involuntary transfers between government facilities and did not involve a challenge to detention in a private prison. The prisoners rebuttal was that if there is no legal authority to hold them in a facility in the first place then caselaw involving only authorized, public facilities is irrelevant.

CCA and similar private operators claim that the private commercial status of these ventures actually provides these prisons with special protection under the Constitution. This issue has been raised

in state legislatures outside Ohio where laws banning or regulating private prisons have been debated.

Generally, Congress and not the individual states, has the plenary power to regulate commerce among states. Thus, it is argued that a state needs no particular law authorizing private prisons since the very attempt at regulation of the enterprise allegedly violates the Commerce Clause. Commerce Clause arguments, however, can be trumped by laws that invoke a state's police power designed to protect the health and safety of its citizens. In these instances, courts find the incidental burden on interstate commerce is acceptable. See: *Maine v. Taylor*, 477 U.S. 131 (1986)(state ban on bait fish does not violate Clause). But see *United States v. Lopez*, 514 U.S. 549 (1995)(prohibition on gun possession in school zone exceeded Congressional power under Commerce Clause) and *C&A Carbone, Inc. v. Clarkstown*, 511 U.S. 383 (1994)(state cannot ban import of garbage).

Does regulation of private prisons violate the commerce clause? Probably not. States have a recognized legislative interest in protecting the security and safety of its citizens. A law that regulates prisoner classification in order to insure that predatory prisoners are not mixed with medium prisoners would probably survive a Commerce Clause challenge. But what about a state law that bans private prisons? This obviously would be a closer issue.

The debate is even more complicated when – as in Ohio – the proposed ban would have interfered with a private prison that has commenced operations. The Contract Clause in the Federal Constitution, or relevant state constitution provisions, are then implicated. These provisions generally prevent a state from interfering with preexisting contracts. The factors considered in determining whether a law violates the contract clause include the severity of the impairment, the history of regulation in the relevant field, the public purpose behind the regulation, whether there is a rational relationship between the means chosen for regulation and the purpose of the regulation.

No court appears to have decided whether a state may ban private prisons after they are already operating in a state.

## #2 - §1983 – Do the Old Principles Apply?

The statutory foundation for most prisoner civil rights cases is 42 U.S.C. §1983. Through this law prisoners can sue those who act "under color of law" for violations of constitutional and federal statutory rights. Most courts have held that private prison operators who contract with governments to confine state prisoners are acting under color of law and therefore are subject to suit. See e.g., *Street v. Corrections Corporation of America*, 102 F. 3d 810 (6<sup>th</sup> Cir. 1996). Over the years a number of principles have been established that provide protection for state defendants sued under §1983. However, these principles either may not apply or not fully apply to private defendants.

a) *Qualified Immunity*. A state defendant is liable in damages under 42 U.S.C. §1983 only if his or her conduct toward the prisoner violates a clearly established constitutional right. The United States Supreme Court has held that this aspect of "qualified immunity" does not extend to private prison operators. *Richardson v. McKnight*, 117 S. Ct. 2100 (1997). The Court reached this conclusion by studying the history and purpose of the qualified immunity defense and found no basis to extend it to private prison employees. The Court reasoned that qualified immunity serves to protect the government employees from lawsuits and thereby insure that government officials will not be timid in the performance of their official duties. The defense helps insure that good people will not be driven from public service by litigation and also serves to keep litigation from interfering with the ongoing business of governance.

The Supreme Court found no similar rationale present with respect to private operators. Competitive market pressures provide sufficient resistance to the impact of litigation. Insurance is available and compensation packages can be structured to keep the pool of talent available to the prison company. Thus, qualified immunity was not extended to private prison operators.

However, the Court did leave open the possibility that a "good faith" defense may provide private operators some measure of protection. This presumably would

## Youngstown (continued)

not serve as an immunity; that is, a bar from suit. It might, e.g., protect those who use force in a good faith belief that the private prison comports with existing law even though that is ultimately held to be incorrect. See *Duncan v. Peck*, 844 F.2d 1261 (6th Cir. 1988)(defendant had good faith defense on suit based on property attachment statute eventually declared unconstitutional). Whether this defense will apply to discretionary acts by a private prison has not yet been explored by the courts.

The *Richardson* rationale may well prove to be a slippery slope for prison entrepreneurs as the courts reexamine the history and purpose of other judicially created protections in the context of suits against private operators.

**b) Vicarious Liability/Entity Liability.** Under the common law, an employer is liable for the acts of its employee-agents that are performed within the scope of the agents' duties. This doctrine of *respondet superior* does not apply to local governments sued under §1983. In fact, government entity liability under §1983 was only recently recognized by the Supreme Court. *Monell v. Department of Social Services*, 436 U.S. 658 (1978). In *Monell* the Court made it clear that simply employing a government worker was not enough to create governmental liability. Rather, the plaintiff must show that the violation was caused by a government custom or policy; that is, that the entity itself was linked to the harm.

Should private prison operators also enjoy defense? At least one court has said, "no". In *Moore v. Wyoming Medical Ctr.*, 825 F.Supp. 1531, 1549 (D. Wyo. 1993), the defendant was a private hospital that contracted to detain potentially dangerous mentally ill patients. Noting that the Supreme Court had not extended qualified immunity to such defendants, the court employed similar reasoning to conclude that the hospital would "not receive *Monell*-type immunity, and the plaintiff need not prove that the defendants acted pursuant to a policy, custom or practice." Most courts, however, have extended "*Monell*-type immunity" to private defendants.

Even if courts choose to extend to private operators the same protection

against vicarious liability that is enjoyed by government, questions arise as to the application of current doctrine to both the private company and its government contracting partner. Who is the policymaker in a private prison company? Does it depend on the facts of each case or can state laws designating a contract representative be used to determine this issue? See, for example, Fla. Stat Ann. §951.062(1); *Milonas v. Williams*, 691 F.2d 931 (10th Cir. 1982)(Operator of private facility liable for unconstitutional practices).

**c) Hands-off Doctrine.** It is well established that the "problems of prison administration are peculiarly for resolution by prison authorities and their resolution should be accorded deference by the courts." *Bazzetta v. McGinnis*, 14 F.3d 774, 779 (6th Cir. 1997)(emphasis added). Like qualified immunity, deference, manifested by the courts keeping their hands-off, is based on principles that are unique to government workers that do not easily apply to private prison operators.

That is, deference to governmental decision-making is based on the separation of powers. The Supreme Court first expressed these principles in *Procunier v. Martinez*, 416 U.S. 396, 405 (1974). In *Bell v. Wolfish*, 441 U.S. 520, 548 (1979), the Court stated that "judicial deference is accorded...because the operation of our correctional facilities is peculiarly the province of the Legislative and Executive branches of our government, not the Judicial." One reason for this deference is that the other two branches of government have the "expertise, comprehensive planning, and commitment of resources" necessary to administer the prison system. *Procunier v. Martinez*, 416 U.S. at 405.

What if a private company claimed that same expertise? The expertise shared by the executive and legislative branch includes a state's decision on priorities, funding, and objectives for various types of sentences. Expertise here, in other words, is not simply competence in one compartment of the criminal justice system and that is all that a private operator fairly may claim. A company that simply built and operated secure facilities, therefore, would be hard pressed to claim the same level of expertise as a state government.

Courts that have examined private prison defendants have not identified any rationale resembling the separation of powers that would support any judicial deference being shown to these defendants. If anything, the forces motivating private companies to enter the prison field may well support more, rather than less, scrutiny of their conduct:

"Unlike public officials, corporate guards and employees are hired to serve the interest of a corporation, and more specifically, its stockholders, whose principal interest is earning a financial return on their investment...especially when a private corporation is hired to operate a prison, there is an obvious temptation to skimp on civil rights whenever it would help maximize shareholder's profits." *Manis v. CCA*, 859 F.Supp. 302, 305 (M.D. Tenn. 1994).

**d) Deliberate Indifference and the Role of Profits.** Under a typical Eighth Amendment analysis a prison operator is not responsible for a violation unless the deprivation is sufficiently serious and the prison operator imposed that deprivation with deliberate indifference to the health or safety of the prisoner plaintiff. *Wilson v. Seiter*, 501 U.S. 294, 298-99 (1991). Many times an objectively inhumane condition exists because the warden of a public prison simply lacks the funds to correct the problem. Courts have held that a prison official who is sued and who lacks the public funds to fix the problem is not deliberately indifferent and therefore not financially liable under the Eighth Amendment. See e.g., *McCord v. Maggio*, 927 F.2d 844 (5th Cir. 1991).

This doctrine would not seem to protect a defendant seeking a profit. Protecting shareholder earnings hardly matches the public policy behind respect for the budget allocation decisions that a legislature with limited tax revenues must make. In fact, the role played by profits may create new examples of deliberate indifference. For example, in *Bowman v. CCA*, No. 3:-96-1142 (U.S.D.C., M.D. Tenn. Order, 8/29/98) the court refused to grant a summary judgment to CCA in a case alleging deliberate indifference in the delivery of medical care. At issue was a decision by a doctor not to hospitalize a patient with sickle cell anemia. Under the terms of the doctor's compensation package, the physician was awarded a substantial financial incentive in ex-

change for reducing non-personnel prisoner health care costs at the prison. By not placing the plaintiff in the hospital, the doctor substantially increased his compensation. The patient, however, died. The jury may well find that such lucrative financial incentives are evidence of deliberate indifference to the health of prisoners under the care of private vendors.

### #3 – Does the PLRA Apply?

The Prison Litigation Reform Act may not apply to private prisons. The definition of “prison” in §802(g)(5) of the Act seems to exclude private facilities. In that section a prison is “any Federal, State or local facility that incarcerates or detains juveniles or adults accused of, convicted of, sentenced for, or adjudicated delinquent for, violations of criminal law.” A private, free standing prison does not fit that description.

This definition section is in the portion of the Act limiting lawsuits regarding prison conditions. Similarly, the definition of “civil action with respect to prison conditions” is “any civil proceeding arising under Federal law with respect to the conditions of confinement or the effects of actions by *government* officials on the lives of persons confined in prison...” §802(g)(2). There is no discussion of private prisons in the legislative history of the act.

Another section of the PLRA, however, imposes limits on damage actions filed by a “prisoner” and in that section the term is defined as “any person incarcerated or detained in *any facility* who is accused of, convicted of, sentenced for, or adjudicated delinquent for, violations of criminal law or the terms and conditions of parole, probation, pretrial release, or diversionary program.” See §803(g)(4). That definition may be sufficiently broad to include private facilities. However, consideration of the objectives of the PLRA may not support that result. The Act is primarily designed to reduce the number of frivolous lawsuits filed by state prisoners and reduce the judicial intrusion on state prison systems. *Hadix v. Johnson*, 143 F. 3d 246 (6th Cir.), *aff’d in part*, *Martin v. Hadix*, 119 S.Ct. 1998(1999).

There is no documented history and no congressional findings with respect to frivolous lawsuits by prisoners of pri-

mate facilities. Courts likely will demand proof that the incidence of supposedly frivolous cases is the same with private facilities. Moreover, courts may not be so eager to step back from such cases in private facilities and assume that the private vendors are addressing the concerns at the facility level in the same manner as with government prison operators. Without more explicit direction from Congress there simply is no clear basis for extending the PLRA to private facilities. In fact, however, the protections of the PLRA are routinely extended to private facilities because most prisoner cases are pro se and the argument for exclusion is not being presented. Thus, as courts attempt to formulate PLRA implementation orders, private prisons become included simply because no one argues for their exclusion. See e.g., *McGore v. Wrigglesworth*, 114 F.3d 601 (6th Cir. 1997)(setting procedures for in forma pauperis applications) and *Brown v. Toombs*, 139 F. 3d 1102 (6th Cir. 1998)(setting procedures for determining compliance with administrative exhaustion requirements).

### #4 – Are Prisoners the Third Party Beneficiaries of the Contract Between the Sending State and the Private Company?

A third party beneficiary is one for whose benefit a promise has been made in a contract, but who is not a direct party to the contract. In appropriate situations, third party beneficiaries can sue to enforce their rights under contracts. *Hill v. Sonitrol of Southwestern Ohio, Inc.*, 36 Ohio St. 3d 36 (1988). A prisoner may claim that he is one of the intended beneficiaries of the contract between the sending state and the private prison company. There may be other contracts with the host state or local government (such as a development agreement) which could also be the basis for this claim by a prisoner.

Before a third party beneficiary can sue to enforce a contract he must show that he is the “intended” beneficiary and not an “incidental” beneficiary. In addition, the performance of the promise must satisfy a duty owed by the promisee to the beneficiary. *Norfolk & Western Co. v. United States*, 641 F. 2d 1201, 1208 (6th Cir. 1980). If the contract is silent on these

issues, the court may look to evidence outside the four corners of the contract to determine whether prisoners are intended beneficiaries. See *Anderson v. Olmsted Utility Equipment, Inc.*, 60 Ohio St. 3d 124 (1991). Sending states clearly have duties to provide minimally safe and healthy care to prisoners committed to their custody. A contract with a private vendor to care for these prisoners could easily satisfy these two requirements.

Many private prison contracts, however, now purport to deny third party enforcement to prisoners. This preclusionary term in the contract may be subject to a challenge on public policy grounds if the sending state refuses to enforce the contract itself. Moreover, prisoners may argue that any transfers between states first must comply with the Interstate Corrections Compact. In that event, a contract term denying third party beneficiary status to prisoners may also violate Article IV of the Interstate Corrections Compact which states that “The fact of confinement in a receiving state shall not deprive any prisoner so confined of any legal rights which said prisoner would have had if confined in an appropriate institution of the sending state.” ORC §5120.50(D)(6).

### #5 – Do Consumer Laws Apply?

In some form, all fifty states have consumer laws prohibiting “unfair or deceptive acts or practices.” Violations covered by such acts can trigger specific performance, rescission, damages and awards of attorney fees. See e.g., ORC §1345.09. These statutes also authorize investigations and enforcement actions by state attorneys general and even criminal prosecution. See e.g., ORC §1345.06. The Ohio statute forbids suppliers from engaging in unfair, deceptive or unconscionable acts or practices. ORC §1345.02, .03. A claim under the statute requires a “supplier”, a “consumer,” and a “consumer transaction.” The provisions of the act are to be liberally construed. *Mermer v. Medical Correspondence Services, Inc.*, 115 Ohio App. 3d 717 (6th Dist. Ct. App. 1996).

The prison company is a “supplier” under the Act since it qualifies as a, “seller or other person engaged in the business of effecting consumer transactions.” ORC §1345.01(C). The prisoner arguably

## Youngstown (continued)

is a consumer since he qualifies as a "person who engages in a consumer transaction with a supplier." ORC §1345.01(D). The provision of food, shelter, clothing, education, medical and other personal services, by the private prison company to prisoners held in the host state is arguably a "consumer transaction." That term is defined, in relevant part, as (1) a sale or other transfer of a service to (2) an individual (3) for purposes that are primarily personal. ORC §1345.01(A). Nothing could be more personal than the delivery of food, shelter and clothing to a person. Moreover, the delivery of these services in the prison setting is not one of the excluded businesses in the act. See generally, *Elder v. Fischer*, 1998 WL 412423 (Ohio App. 1 Dist., 1998)(Billing practices of residential treatment facility were consumer transactions).

Consumers who are not parties to the contract have been able to secure relief under the act. *Garner v. Borcharding Buick, Inc.*, 84 Ohio App. 3d 61 (1992). Thus, even if a third party enforcement action is not possible, a consumer claim may secure the same result – enforcing contract terms that are important to prisoners.

One example of how this theory could be applied is present in the Youngstown experience. CCA and D.C. agreed to the following terms in the contract:

"C.1.2.1.1 The Contractor shall have sufficient programming to allow every general population prisoner to participate in programs of occupational training and industrial or other work...

"C.1.2.4 The Contractor agrees to provide sufficient programs to allow every general population prisoner to participate in meaningful educational, vocational, drug treatment or work programs..."

Clark Report, Chapter VI, p. 1 (emphasis added). The company never met these terms and D.C. never enforced these terms. Had the case continued the prisoners were prepared to seek specific performance of these terms, damages and attorney fees due to the failure of the prison company to honor its commitments.

## #6 – Are REITS Proper Defendants?

Private prison companies have taken advantage of various corporate forms in order to maximize profits and reduce taxes. Many private prisons are now owned by real estate investment trusts (REITS) which, under the IRS code, generate non-taxable income. See generally 26 U.S.C. §856. The ownership of these facilities normally has been transferred to the trust after an initial development agreement, and after the original agreement to receive prisoners was signed. REITS, under the IRS code, cannot participate in the actual operation of activities on real estate owned by the REIT.

Prisoners and others argue that, in fact, the original development agreements to which the REITS have succeeded, impose responsibility for the safe operation of the facility on the REIT. Thus, the REITS cannot both own the prison and disclaim responsibility for its operation. If this argument prevails, then a REIT has responsibility for operations that extend beyond what is appropriate under the IRS code. That is a problem for the private prison companies that can be exploited by the prisoners or other plaintiffs seeking compliance. That is, rather than putting the tax status of the REIT at risk, the private prison operators may rather comply with the demands of the host community, host state, sending state, prisoners or others challenging conditions. If a REIT is named as a defendant in a civil rights case there will certainly be a motion to dismiss by the REIT. Since losing such a motion could put the tax status of the REIT in jeopardy, the parties in this situation may well have an added incentive to solve their underlying problem.

## #7 – Nuisance Actions by Neighbors and Nearby Governments

Common law nuisance theory may support actions by neighbors and nearby government jurisdictions to abate an ongoing problem at a private prison. Plaintiffs in such cases must show an invasion of their private interest in the use and enjoyment of land due either to intentional and unreasonable conduct or due to unintentional but negligent, reckless or abnormally dangerous conduct. Precedent provides some support for the

use of nuisance theory but recent litigation has not relied on this theory. See *Brown v. Cty. Commissioners of Scioto Co.*, 87 Ohio App. 3d 704, 712 (Scioto Co. App. 1993), citing Restatement of the Law 2d, Tort (1979) 100, §§821D, 822. See generally, *District of Columbia v. Totten*, 5 F. 2d 374 (D.C. App. 1925)(Lorton Prison Complex); *City of Atlanta v. Carroll*, 194 Ga. 172 (1942)(prison farm); *Hughes v. McVay*, 113 Wash 333 (1920)(children's detention home). Thus, nuisance theory need not be abandoned by plaintiffs but it is not among the strongest of the legal theories mentioned here.

## III. Youngstown Case Study – The Solution

After prevailing in the early rounds of the litigation, CCA and the D.C. Government were finally subjected to a court order in March, 1998 that was designed to reduce the violence at NOCC by requiring that all of the prisoners to be reclassified. Earlier that month the Ohio legislature passed ORC §9.07, a compromise piece of legislation that would impose state regulation on private prisons in Ohio. Finally, late in 1998 and early 1999, comprehensive settlement talks were pursued that resulted in a resolution of the class action lawsuit.

The reclassification order soon resulted in many of the most violent prisoners being transferred from NOCC. That action alone dramatically improved safety in the prison. The new state law – which by its terms did apply to the existing CCA prison – added additional regulations. First, it required the prison to contract with the local municipality. Second it required that contract to contain terms requiring American Correctional Association (ACA) accreditation, disclosure of unusual incidents and reports to the Ohio Department of Rehabilitation; insurance protecting the state and local government; an appropriate classification system; an exclusion of prisoners with histories of escape or violence against staff and visitors; access to local law enforcement guards; background and drug tests for staff; provisions for reimbursing Ohio and local governments for incarcerating and holding prisoners who commit crimes in the private prison; and a schedule of fines for noncompliance. The new law also requires minimum training for staff, including firearms training

and review by Ohio's watchdog agency, the Corrections Institution Inspection Committee.

The settlement of the class action, went even further and established an independent monitor for the facility. A medical monitor was also appointed. Under the settlement the prison must abide by the standards established by the National Commission on Correctional Health Care (NCCCHC) and the medical and other policies already drafted for the facility, which were quite specific and tough. Additional terms were negotiated to cover staffing, classification and programming. The parties granted considerable power to the monitor — even the power to trump decisions of the warden if such decisions were deemed to violate the settlement agreement. Detailed enforcement provisions were hammered out. The settlement agreement is to last three years. Most of the provisions, however, were incorporated into a renewable contract between the City of Youngstown and the company which will be ongoing. Independent monitoring from the host community will therefore be a fact of life at NOCC.

CCA paid, on behalf of itself and the District Government, \$1,650,000.00 in damages to the 2000 members of the prisoner class. That represents the highest class action recovery by prisoners in any prison conditions lawsuit. Families of the deceased prisoners are permitted under the settlement to file their own lawsuits. Additional sums were negotiated to cover the expenses of litigation and fees for both the litigation and monitoring by class counsel (\$756,000) and by Youngstown (\$47,000). Finally, CCA agree to pay annual fees to Youngstown for its ongoing monitoring work. The agreement specifically provides that the PLRA does not apply to its terms. This permits the monetary awards in the case to be free of the limits imposed by the PLRA.

Pending at the time of the settlement were motions for summary judgment on several of the issues described above. More important than the interesting legal issues, however, were the facts. After two murders, numerous medical deaths, six escapes; with criminal prosecutions proceeding on numerous crimes committed in the facility — the local, state and federal authorities were all calling for a permanent fix. The lawsuit was poised

to serve as a vehicle for negotiating that solution. Through the class action lawsuit, the Clark Investigation and Report (see n. 4) and the CIIC Investigation and Report all of the structural defects in the existing contractual relationships had been exposed. The settlement terms greatly increased accountability and oversight so the chances of the old problems resurfacing are substantially reduced.

In a decision filed on May 11, 1999, Federal District Judge Dan Aaron Polster approved the settlement and outlined the facts as well as the legal and policy issues presented by this challenging case. The court approved the settlement noting both the urgent need for the solution as well as the comprehensive nature of the solution:

A national debate is underway about privatization generally and about the growth of private prisons in particular. While the debate continues, NOCC is up and running and in control of over 1000 men. The residents of Youngstown cannot wait for the results of this national debate. Nor can the people of the City of Youngstown and the State of Ohio. It is now a matter of public record that serious problems followed the rapid opening of NOCC in 1997. Injuries were inflicted and lives were lost.... The Clark report tracked the problems and noted the progress... It concluded with the following warning: 'Long-term success can be achieved only if there is a strong commitment to improvement and accountability by CCA and the District Government, along with close public scrutiny in the District [of Columbia] and Ohio.' Clark Report Chap. 12, p. 4. This settlement achieves that scrutiny and that commitment.

#### IV. Conclusion

NOCC is now a much safer prison. Health care has improved and the entire facility is better off than when it opened. The issues reviewed in this article were instrumental in helping the parties negotiate a solution to the violence and inadequate health care that existed at NOCC. Advocates for all parties can learn from this and hopefully, design controls on future facilities that will insure safe and healthy operation from the outset. The Youngstown model settled the Youngstown case. It can, should and will be improved. Important questions remain. Does it make sense to impose on municipi-

palities with no prison experience the job of regulating multinational prison companies? Would state licensing and regulation work better than contracts? What classification system should be used when a facility has prisoners from multiple jurisdictions? Should there be separate controls on medical care? What level of delegation should be permitted with respect to discipline and other matters that could affect the length of sentence? Let's hope we can tackle all of the problems posed by speculative prisons in a manner that does not put lives needlessly at risk. ■

*[Editor's Note: PLN reported extensively on events at the NOCC as they were unfolding. The author of the article was lead counsel in the case against the CCA. This article originally appeared in the Correctional Law Reporter and is reprinted here with the author's permission. End notes were removed due to space restrictions.]*

### \$1.5 Million Settlement in CA Jail Suicide Attempt

On June 6, 1996, a California man was arrested on charges of drunk driving after being involved in a traffic accident. He was unable to make bail and was confined in the Los Angeles county jail to await trial. While in the jail he became depressed, incoherent and refused to take any psychiatric medication or cooperate with jail medical staff.

When he was placed in the jail's general population, jail staff teased and ridiculed him and told him that due to his mental state he would never leave the jail or see his family again.

In a depressed state, the prisoner tried to kill himself by jumping from a jail bunk three times. On the third attempt he landed on his head and neck, severing his spinal cord which left him permanently disabled.

He filed suit in federal court claiming that jail officials violated his constitutional rights by failing to diagnose and treat his mental illness. The jail settled the case by agreeing to pay him \$1.5 million. The name of the plaintiff, case name and case number are confidential and were not reported. ■

Source: *Washington Journal*

# From the Editor

by Paul Wright

Thanks to the response our fundraiser has achieved, *PLN* was recently able to hire a second staff person, Linda, to help with our essential office tasks. Right now the main thing she has been doing is helping Fred, our office manager, get caught up on the many essential tasks that have fallen behind due to the immediate concern of getting *PLN* published each month. However, as things stand now, we will still need to raise additional funds to ensure we can employ Linda on a continuing basis.

A *PLN* supporter who wishes to remain anonymous has offered *PLN* a \$15,000 matching grant. Under the terms of the grant, any prisoners who make a donation will receive a two to one matching donation. Thus, if a prisoner donates \$20, *PLN* will receive a matching grant of \$40 from the donor. Individual donations from non prisoners will be matched one to one up to \$500. For every dollar a non prisoner donates, *PLN* will receive a matching dollar. The matching grant offer runs from March 1, 2000 through January 15, 2001, or until we reach the \$15,000 limit. The matching grant does not cover the cost of subscriptions, book purchases, in kind gifts or foundation grants. It does cover all donations above and beyond the cost of a subscription. For example, if a prisoner sends *PLN* \$20 and states that \$15 of it is to renew his *PLN* subscription and the remaining \$5 is a donation, *PLN* will receive a matching grant of \$10.

We encourage all of our readers to send a donation to enable *PLN* to qualify for the full amount of the matching grant. Stamps and embossed envelopes can be donated and no amount is too small. Quite literally, every little bit helps. Unlike the bigger non profits where most of the money obtained via fundraising is sucked up by administrative costs, consultants and expenses, *PLN* is different. Every penny you donate to help *PLN* goes into just that. We have no bloated bureaucracy, no expensive consultants and no professional fundraisers taking a percentage of donations. Your donations go directly into funding *PLN*'s work. Don't think for a minute that your contribution is too small or too insignificant to make a

difference. It all helps. Between now and January we will report the progress of our matching grant program.

*PLN* frequently receives queries about submitting articles. To get a copy of *PLN*'s writer guidelines send an SASE. Right now we are looking for people interested in becoming *PLN* contributing writers for law and/or news articles. Anyone interested in writing law articles should have access to a law library or current court rulings and a good knowledge of prison and jail civil rights litigation. *PLN* can't afford to pay its writers but we hope to do so eventually. If you are interested in becoming a *PLN* contributing writer contact me directly or via *PLN*'s Seattle office, include any writing clips, experience or qualifications with your letter.

So far 147 *PLN* readers have responded to *PLN*'s survey. Most of the respondents are prisoners. The vast majority like *PLN*'s content the way it is. Three or four readers said our articles are too simplistic and too short, another three or four said the articles are too long and too complex. John Midgley's "Pro Se Tips and Tactics" column is a huge favorite. A lot of readers said they want to see more "how to" and habeas corpus information. One attorney commented that *PLN* has great legal writing, but cheap paper. A frequent comment was a desire for more ads offering services and products aimed at prisoners. A number of readers said they would like to see bigger issues of *PLN*.

One way for *PLN* to expand its size, and print on higher quality paper (a long standing goal of mine) is if we can increase our number of advertisers. If you buy goods or services from someone and you are pleased with the results and think they would benefit from exposure to a national prison audience, suggest that they contact *PLN* for advertising information. Or better yet, send *PLN* their contact information and we will send them an advertising packet. Most of *PLN*'s current advertiser's learned about *PLN* after their customers told them about us. *PLN*'s ad rates are inexpensive and very affordable. Expanding our advertiser

base will allow us to increase our page size as well as inform our readers of services and products they can use.

We also received suggestions that *PLN* distribute more self help legal books. It is a great idea and one we have tried to implement. The problem we have encountered is that most legal publishers won't advertise their products in *PLN* and they also won't sell their books to *PLN* at a discount for us to distribute. They are pretty oblivious to the legal needs of prisoners. We are continuing to work on this, and with more staff time available perhaps we can make some headway. As things stand now, the books we are advertising or distributing are the only ones we have been able to make any progress with the publisher.

Thank you for supporting *PLN*. Please let others know about *PLN* and encourage them to subscribe. ■

Harvey R. Cox, MS  
Corrections Consultant  
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# Pro Se Tips and Tactics

by John Midgley

In my last column, I discussed when you can appeal from a trial court ruling against you and how to appeal if you decide to. I left for this second column on appeals the large question: Should I appeal? In other words, will it do me any good to appeal?

As always I assume that you have filed a civil rights action in federal court against a condition or practice in the prison that you claim is unconstitutional. In this column, I use the term "Civil Rule" to refer to court rules in the Federal Rules of Civil Procedure and "Appellate Rule" to refer to rules in the Federal Rules of Appellate Procedure.

## Standards of Review

To decide whether you should appeal, you must think about two things: What kind of ruling the trial court made, and what you plan to complain about on appeal. You must think about these things because of what is called the "standard of review" on appeal. The "standard of review" refers to the law that controls how the appellate court will look at each issue you raise. Some standards of review require the appellate court to give the trial court "deference," meaning that the trial court's decisions will stand unless they are clearly wrong. Other standards of review require the appellate court to decide an issue for itself without having to give deference to the trial court. The kind of ruling the trial court made plus what you are complaining about will determine what standard of review will be applied.

For every issue you raise on appeal, there will be a standard of review. If the standard of review is relatively favorable to those who appeal, you may well have a good chance to win on appeal. If the standard of review is not as favorable – if the appellate court must give more deference to what the trial court did – your chances are probably not as good. But whether the standard on your issue is favorable or unfavorable, you cannot get away from talking about the standard of review on appeal: Appellate Rule 28(a)(9)(B) requires that you say in your

brief on appeal what is the standard of review for every issue you raise.

I will very briefly discuss standards of review relating to some typical kinds of rulings on which you may be appealing: A decision on the merits (verdict) after trial, and rulings ending the case without a trial, such as dismissal of your complaint under Rule 12(b)(6), or a summary judgment ruling against you and in favor of the defendant.

## Appeals After Trial

There are many different things that can go against you at trial and which you can complain about on appeal. There is, however, not just one standard of review for claims on appeal that something went wrong at trial. Instead, appellate courts apply different standards of review depending upon what kind of issue is raised on appeal. I will discuss only three of the most common examples.

First, if your case was tried to a judge sitting without a jury, and your claim on appeal is that the judge got the facts wrong, you will face what is called the "clearly erroneous" standard of review. This standard is set by Civil Rule 52(a), which states that a judge must making written fact findings after trial, which "shall not be set aside [i.e., not overturned on appeal] unless clearly erroneous and, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses." A good discussion of what this means is in *Anderson v. City of Bessemer*, 470 U.S. 564, 573-576, 105 S.Ct. 1504, 1511-12 (1985). As set out in *Anderson*, appellate courts are not in the position of the trial court in making factual findings, and so findings of fact by the trial judge may be overturned on appeal only if the appeals court can say definitely that the trial judge was wrong. Even if the appeals judges might have made different findings if they had been the trial judge, they cannot overturn "if the district court's account of the evidence is plausible in light of the record viewed in its entirety." In addition, if the trial judge's findings are based on deciding whether witnesses told the truth or

not, the appellate court must give "even greater deference to the trial court's findings."

Second, if you claim that rather than finding the facts incorrectly, the trial judge made an incorrect ruling on important law that applies to the case, the appellate court will review this claim "de novo," which means doing it all over again as if the first time had never happened. This is very different from review of the trial court's factual findings, because it means that the appellate court will decide for itself what the correct law is without deferring to the trial court. For a discussion of why this is the standard of review on questions of law, and how this differs from the "clearly erroneous" standard of review applied to district court findings of fact, see *United States v. McConney*, 728 F.2d 1195, 1201 (9th Cir. 1984)(En banc).

One example of an important ruling of law at trial is the court's decision about what to put in jury instructions. In the instructions, the trial court tells the jury what the law is that they must apply to the case. Suppose the judge incorrectly tells the jury that the defendant cannot be liable for failing to protect you from another prisoner unless the defendant told the other prisoner to assault you, when the correct law is that the defendant is liable if he shows "deliberate indifference" to a serious, known risk that the other prisoner would assault you. *Farmer v. Brennan*, 511 U.S. 825 (1994). The appellate court will review this issue of law "de novo," without deferring to what the trial court decided. See, e.g., *Coleman v. B-G Maintenance*, 108 F.3d 1199, 1202 (10th Cir. 1997).

Note that just because the appellate court decides that a technically incorrect jury instruction was given, this does not necessarily mean you will get a new trial. You must also convince the appellate court that the legal error was not "harmless." The law of harmless error cannot be covered in this short column, but in essence the question the appellate court looks at is "not whether the instruction was completely faultless, but whether the jury was misled" on important legal issues that could have affected the

## Pro Se Tips (continued)

outcome of the case. *Coleman*, 108 F.3d at 1202.

A similar type of “de novo” review applies after a trial to a judge without a jury. In the judge’s written ruling after trial that is required by Civil Rule 52, the judge should state the legal standard that was applied to the facts. If you claim that, for example, the judge used the wrong standard to decide your “failure to protect” case, then the appellate court will decide this legal question without deferring to the trial court’s view of the law. The appellate court is likely to give you a new trial if the trial judge was mistaken about a crucial part of the law and that mistake could have affected the outcome of the case.

Third, if you simply argue on appeal that a jury made the wrong decision, you will face a very unfavorable standard of review. This is because appellate courts, if the law has been correctly stated by the trial judge, will normally leave it to the jury to decide what happened. In deciding what happened, the jury gets to decide for itself whether witnesses are telling the truth or lying, what the significance of any piece of evidence is, etc. Because these issues are left to the jury, an appellate court will not change a verdict just because it may have been wrong, or even if the appellate judges would have themselves decided the case differently if the appellate judges had been on the jury. They will only overturn a verdict if there is not enough evidence for a reasonable jury to have ruled the way it did. *Moore v. Local Union 569*, 989 F.2d 1534, 1546 (9<sup>th</sup> Cir. 1993); *Darnell v. Nance’s Creek Farms*, 903 F.2d 1404, 1406 (11<sup>th</sup> Cir. 1990).

### Appeals From Rulings Ending The Case Without Trial

If the trial court dismisses your case under Civil Rule 12(b)(6) – “failure to state a claim upon which relief can be granted” – it dismisses just by looking at the complaint itself, without any evidence being presented. Appellate courts do not usually favor this kind of dismissal because it comes so early in the case, before the

trial court really knows anything about what happened. The Supreme Court has long made clear that “a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.” *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957). The Court has also emphasized that “[t]he issue is not whether a plaintiff will ultimately prevail but whether the claimant is entitled to offer evidence in support of the claims.” *Scheur v. Rhodes*, 416 U.S. 232, 236 (1974).

Appellate courts look at 12(b)(6) dismissal as a legal question, and therefore they review “de novo” without having to give deference to the trial court’s decision on this question. *Springdale Education Association v. Springdale School District*, 133 F.3d 649, 651 (8<sup>th</sup> Cir. 1998). This means that the appellate court will assume the facts in the complaint to be true, and determine whether there is any set of facts consistent with the complaint that would entitle the plaintiff to relief. *Warshaw v. Xoma Corp.*, 74 F.3d 955, 957 (9<sup>th</sup> Cir. 1996). This is a very favorable standard of review, but it does not mean that every 12(b)(6) dismissal will be reversed on appeal. If you make factual allegations in your complaint that, even if true, would not make out the constitutional violation you claim, you should not expect to win on appeal.

The trial court is supposed to grant a defendant’s motion against you for summary judgment only if “there are no disputed issues of material fact and [the defendant] is entitled to judgment as a matter of law.” Civil Rule 56. In deciding whether to grant summary judgment, the trial court looks at affidavits and other pieces of “paper” evidence, such as documents, transcripts of depositions, etc., but the court does not hear live witnesses. The court then decides whether under the law the defendant should win because you cannot produce enough evidence to support a verdict in your favor if the case were to go to trial. *Anderson v. Liberty Lobby*, 477 U.S. 242, 106 S.Ct. 2505 (1986).

On appeal from summary judgment, the appellate court views the material that was presented to the trial court in the light most favorable to the party against whom summary judgment was granted, and applies “de novo” review. *Valandingham v. Bojorquez*, 866 F.2d 1135, 1137 (9<sup>th</sup> Cir.

1989). The appellate court reviews “de novo” because it is deciding legal questions, not factual issues. Even the question whether “there are no disputed issues of material fact” is a legal question: Is there enough evidence in the record that would allow the jury (or trial judge) to find this important fact in your favor? The appellate court is not deciding that the jury *should* rule in your favor, but whether the jury *could* rule in your favor, and that is a question of law. *Valandingham* is a good example of how these principles are applied in a real case.

### Tips And Tactics

As you can now see, whether you should bother to appeal depends upon what happened to you in the trial court, what the record shows, and what you would be complaining about on appeal. If after a trial all you can say is that you disagree with the final result at trial, but you cannot show that an important ruling of law that was both wrong and harmful to your case, your chances on appeal are not good. If, on the other hand, you can show that an important part of the law was misstated to the jury or misunderstood by the judge, you have a much better chance to win on appeal.

Thus, when you are thinking about whether to appeal from a ruling or verdict after trial, include in your thinking whether the error about which you complain can be characterized as a legal error, or as based on a legal error. For example, in some cases you can argue that a trial court made a finding of fact against you *because* the court misunderstood the law; or you may be able to argue that something that was labeled a “finding of fact” is instead what is called a “mixed question of law and fact” that is subject to “do novo” review in the appellate court. You can find an introduction to these complicated questions in *Pullman-Standard v. Swint*, 456 U.S. 273, 102 S.Ct. 1781 (1982) and *United States v. McConney*, 728 F.2d 1195 (9<sup>th</sup> Cir. 1984)(En banc).

In deciding whether to appeal from a pretrial ruling that ended the case such as summary judgment or 12(b)(6) dismissal, your thought process should be somewhat different. You know you will get the favorable “de novo” review of the legal question whether the trial court

should have ended the case. But you still must assess whether the complaint (on a 12(b)(6) dismissal) or the written materials on file (on summary judgment) are strong enough to support your case moving forward in the district court. The “de novo” standard of review cannot make up for a complaint that really does not state a constitutional claim, or for a lack of evidence on summary judgment sufficient to truly create an issue of material fact.

When you are assessing whether you have a strong appeal, make sure that you consider only evidence that was presented to the trial court, and don’t count things that you wish had been presented,

but were not. Except in very rare circumstances, a court of appeals will only look at evidence and papers that were presented to the district court. You usually cannot ask the appellate court to look at new material that the trial court did not see.

The subject of standards of review is large and complicated; this column is only a brief introduction to the kinds of questions you will need to ask to figure out the correct standard of review for your case. As always, you should do your own legal research in the jurisdiction in which your case is filed before you decide what to do in your case. ■

*[John Midgley is a staff attorney with Columbia Legal Services in Seattle.]*

## Sports Ad

### Hearing Required Prior to Automatic Termination Under PLRA

The Eleventh Circuit has held that a federal district court must hold a hearing on the current conditions at the prison and the scope of the prospective relief to be terminated before terminating prospective relief in a prison conditions lawsuit under the PLRA’s “automatic termination” provision, 18 U.S.C. § 3626(b)(3).

This is a class-action civil rights lawsuit brought under 42 U.S.C. § 1983, complaining of overcrowding at the Jackson County (Alabama) Jail. The defendants were Jackson County and Alabama Department of Corrections (DOC) officials. The district court entered two consent decrees and a permanent injunction requiring the timely removal of state prisoners from the jail.

After passage of the Prison Litigation Reform Act (PLRA), the Attorney General of Alabama and the DOC filed a motion to terminate relief pursuant to the automatic termination provisions of the PLRA. The district court granted the motion without holding a hearing. The plaintiffs appealed claiming that the Attorney General had no standing to file a motion to terminate because Alabama was not a party to the consent decrees and that district court should have held a hearing on the current conditions at the jail and the scope of the relief to be terminated prior to granting the motion.

The Eleventh Circuit held that the Attorney General did have standing to file the motion to terminate—even though he did not officially request permission to intervene and was not a party to the consent decree—because Alabama was a party in the initial suit and its interests were not adequately represented by the parties.

The court also held that the district court erred when it granted the motion to terminate without holding a hearing. Holding that, “although the PLRA grants the district court broad authority to terminate prospective relief upon a motion of any party or intervenor” there is “an important limitation on this authority,” that it must make written findings based on the record regarding whether prospective relief remains necessary to correct a current and ongoing violation of a Federal right the court concluded that it would be unfair to require the party opposing termination to meet these requirements, “then not provide that party an opportunity to present evidence on that point.”

The court held that, even though a court-appointed monitor had been making reports on the conditions at the jail, the monitor’s reports could not alleviate the need for a hearing. The district court’s dismissal was reversed and the cause remanded for an evidentiary hearing. See: *Loyd v. Alabama Dept. Of Corrections*, 176 F.3d 1336 (11th Cir. 1999). ■

# Guarding Their Silence

## Corcoran Guards Acquitted of Rape

by Christian Parenti

The acquittal in November, 1999, of four California prison Guards charged with arranging for a young prisoner to be raped by Corcoran State Prison's notorious "Booty Bandit" was the result of a massive legal and political show of force on the part of the state's prison guards union, prisoners' advocates say. The four guards were facing nine years in prison.

State prosecutors alleged that in March 1993, the four Corcoran State Prison Security Housing Unit officers, led by Sgt. Robert Alan Decker, *deliberately transferred* prisoner Eddie Dillard to the cell of Wayne Robertson, aka the "Booty Bandit" knowing that the younger, smaller prisoner would be raped. At trial, Robertson testified that he had indeed beaten and sodomized Dillard for two days because guards had said that Dillard needed to "learn how to do his time."

But the defense — led by four adroit lawyers and funded by the guards' union — countered that the accused guards had no idea at the time that Robertson was a rapist. "I agree that Wayne Robertson is a rapist and a thug, but that fact was not known to the floor staff," said defense attorney Curtis Sisk in his opening arguments. One of the officers told the jury that the first time he even heard of Wayne Robertson was in an article in the *Los Angeles Times*.

The California Correctional Peace Officers Association — which paid the defendants' legal costs and launched a media campaign to support them — is one of the state's most powerful lobbies. During the last election cycle, the group poured millions of dollars into state races, supporting candidates from both parties and waging a \$2 million media campaign on behalf of Gov. Gray Davis.

"We are obviously very pleased. The four guards and their families are the real victims here," said union president Don Novey.

With a pending federal trial and several criminal investigations of prison staff still open, the CCPOA left as little as possible to chance during the state investigation and trial. The union's publication, the *Peace Keeper*, encouraged

rank-and-file members not to trust or speak with the FBI and state investigators. Critics of the union say this and quick intervention by CCPOA lawyers effectively shut down the flow of information at the source.

As the so-called "Booty Bandit" trial approached, the CCPOA also turned to the public relations side of the political equation, targeting Hanford-area residents with a slew of radio and TV ads full of menacing, tattooed convicts and brave guards walking "the toughest beat in the state." (The union says the timing of the ads was mere coincidence, and was not related to the pending case.)

And once arguments in the case opened, the CCPOA's concern was manifest in attendance of a steady stream of local chapter officials and union heavies.

For prisoners' rights activists like Tom Quinn, a private investigator who specializes in researching cases against California jails and prisons, the presence of CCPOA honchos was just another example of how a code of silence is encouraged and enforced by the leadership of both the union and the Department of Corrections.

"Fundamentally, the claim that these guards didn't know that Robertson was a rapist is totally implausible," Quinn said. "The SHU [Security Housing Unit] is a unique social experiment designed to generate information." Along with elaborate records and dossiers kept on all the inmates, Quinn points out that guards have a relatively clear view into most of the SHU cells, both from the tier and from inside the control booth. "Furthermore," adds Quinn, "the C.O.s [correctional officers] are constantly working snitches. They know who's who. And they knew ... that Robertson was a rapist."

Quinn's claims were affirmed by Connie Foster, who worked as a staff member at Corcoran in 1993. "I heard about Robertson a week after I arrived," Foster said.

### Did Lockyer's Office Botch the Prosecution?

But despite claims like these, the state has had difficulty breaking the

guards' silence. Among other things, say the union's critics, the CCPOA's massive campaign war chest has proved a valuable tool in discouraging local district attorneys from prosecuting cases against prison guards.

The Dillard case, for example, was almost filed by the Kings County district attorney, but Greg Strickland, who then held the county post, dropped the charges, citing lack of evidence. Many speculate that Strickland was also scared of the CCPOA. He had already crossed the group once, by prosecuting Corcoran guards involved in a 1995 beating incident. Sure enough, the union's wrath materialized during the next D.A.'s race, in the form of a massive campaign donation to Strickland's opponent. In testimony before a state legislative committee, Strickland suggested the creation of "an independent prosecution unit" because, as he put it, "My incumbent owes the CCPOA \$30,000 worth of campaign contributions." That project was vetoed by Gov. Davis, but a compromise was eventually struck, leading to the creation of a new inspector general position, which is filled by gubernatorial appointment.

Lockyer spokesman Nathan Barankin said that getting good investigations from local prosecutors and police forces in the small towns that house many of these prisons continues to be a problem. He said in the Dillard case specifically, there was no investigation after the crime was committed.

Barankin did acknowledge that, in the wake of this case and the federal investigation at Corcoran, a number of changes have been implemented both by the Legislature and the Department of Corrections. Besides the new inspector general position, new shooting policies have been implemented at all state prison facilities.

Still, Barankin conceded, the new policies are not a guarantee that this will never happen again: "You can investigate until you're blue in the face, but you still have the question of who prosecutes it." Barankin said local district attorneys would normally prosecute these cases,

but that in the small counties where most state prisons are located, "to accept one of these cases would eat up everybody you have in the place, plus every red cent you've got to get one of these cases to court." The local D.A. could hand the case off to the attorney general, but Barankin said by the time that happens, usually "the A.G.'s office comes in to pull together the pieces. D.A.s have their own investigators" who work closely with local police right after the crime is reported. "It remains to be seen if this new inspector general will work the same way."

While prisoners' rights activists sympathized with Barankin, they blamed Lockyer's office — specifically deputy attorney general Vern Pierson — for botching the prosecution. They say the state's strategy failed to make the code of silence and culture of terror at Corcoran central issues in the case.

Based on his research of California jails and prisons, Quinn said the "Booty Bandit" trial was about much more than the fate of four prison guards. "Clearly, part of what was on trial here was the guards' code of silence, the power of the CCPOA and the culture of terror that defines life in California's maximum security prisons," he said.

Quinn acknowledged that much of that was impossible to pursue in court when Judge Louis Bissig disallowed conspiracy charges brought against the four guards. "Our hands were tied by some of the judge's rulings and the fact that it took five years for this crime to surface and be prosecuted," Pierson told the *Los Angeles Times*. "And it's never easy when your best witnesses of what really happened are felons and officers who have committed [crimes] themselves."

That sentiment was echoed by Barankin. "Having the conspiracy charges thrown out by the judge was gigantic. That can't be quantified," he said. But Barankin conceded that "there were all sorts of places along the way where things fell apart."

### **A Guard Who Goes by the Nickname "Bonecrusher"**

Activists say much of the blame rests with Pierson, arguing that his most crucial misstep was the handling of star witness Roscoe "Bonecrusher" Pondexter. A former guard and onetime professional basketball player, Pondexter

testified against the four accused guards in exchange for immunity from prosecution.

Pondexter testified that he was once a sadistic "search and escort" officer in the Corcoran SHU. He ran with a gang of guards called the Sharks and his specialty was to beat and strangle prisoners. "We would show them 'the Corcoran way' and tell them this was a 'hands on' institution," said Pondexter. He was eventually fired for brutality.

But Pondexter's testimony was later picked apart by defense attorney Katherine Hart, who showed that Pondexter was on vacation the day Dillard was moved into the Booty Bandit's cell. Pondexter had previously testified he was working that day. "You had a faulty memory about that, didn't you?" asked Hart.

"Yes," Pondexter admitted, squandering much of his credibility in the process.

Afterward, a vexed and embarrassed Pondexter was heard complaining to a friend that Pierson hardly prepared him for testimony, briefing and questioning him for only 25 minutes, just before he took the stand.

Barankin refuted that claim, saying prosecutors spent "a considerable amount of time preparing Mr. Pondexter for the trial." When asked about why they did not check records that showed Pondexter was not even working that day, Barankin said, "The defense had access to information we didn't have. We found out the same time [the jury] did."

Also missing from the state's case was much of the detail that had emerged during grand jury testimony and during last year's legislative hearings. According to both these inquiries, the story of the Dillard rape and ensuing coverup went as follows: Dillard and Robertson — both members of the Piru Bloods, a Los Angeles street gang, though separated by a 20-year age difference — had first come into conflict at Tehachapi State Prison in 1992. There Robertson made sexual advances on Dillard and was rebuffed. Soon thereafter Robertson, already a documented jailhouse rapist, was transferred to the Corcoran SHU.

In 1993, Dillard kicked a female guard and was sent north to Corcoran. In his grand jury deposition, Robertson told how Sgt. Robert Alan Decker showed him a

list of four proposed cellmates. Robertson chose Dillard and a few days later, while lying on his bunk, looked up to see the protesting Dillard being thrust into his cell by two officers.

Dillard explained the rest when he took the stand: "Before I knew it, we were getting into it. We were tussling and he said he was going to rape me. I tried to fight him off but I couldn't. He raped me," said, Dillard, his voice breaking. Dillard finally escaped the cell when guards came to take Robertson to an unrelated disciplinary hearing. Desperate, Dillard refused to re-enter the cell.

Finally, Dillard told an officer that Robertson had raped him. The officer filed a report and passed it on to a sergeant, but the report was lost. Dillard was then examined by a prison medic, who saw no sign of rape. A doctor examined Dillard and ordered a "rape kit" — a full internal rape examination — but the order was quickly and mysteriously countermanded and Dillard was never properly examined. After getting a new cell, Dillard started sending administrative complaints, known as "602s," about Sgt. Decker and the rape to officials in Sacramento.

Records show that on June 16, 1993, Dillard suddenly withdrew his complaint and stopped his follow-ups. That was the same day that Decker signed in for a visit with Dillard on his new cell block. According to Dillard, Decker gave him a simple choice: Drop the 602, or go "back in the cell with Robertson."

Little of this chronology was spelled out during the trial, though, and none of the defense witnesses seemed to remember much — all of which undermined the prosecution's case.

"We went over everything, covered everything, a lot of documents," the jury foreman, who declined to give his name, told the *Los Angeles Times*. "In the end, there was just too much reasonable doubt. There just wasn't a lot of evidence that supported what the prosecutor was trying to prove."

That was the fault of the prosecution, said prisoners' rights attorney Catherine Campbell. "My impression was that [Pierson] was on automatic, doing a job that was distasteful to him," she said. "He had no moral passion. The lapses, particularly the one with Pondexter — that sort of thing throws a witness off center."

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## Guarding Their Silence (continued)

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The attorney general's office stood by Pierson, saying that he had inherited an impossible situation. "The football field is littered with Monday-morning quarterbacks," said Barankin. He agreed

## Megan's Law Fallout

by W. Wisely

The 1996 Megan's Law, an amendment to the 1994 Wetterling Act, requires public notice when convicted sex offenders move into a community. Some 14 states provide that public notice by posting photographs, addresses, and conviction records of sex offenders on Web pages, according to the *Law Enforcement News*. "States are doing this to correspond with the Megan's Law aspect of the Jacob Wetterling Act, and this actually does meet that provision as an inexpensive and reaching way for states to distribute information about sex offenders-their way of doing community notification," said Scott Mattson, research associate with the Center for Sex Offender Management.

On the Virginia State Police's web page, some 4,000 sex offender records can be accessed by the public. But, there are some unintended consequences of using the Internet to notify the public that a sex offender may be in their midst. Web pages are relatively easy for experienced hackers to attack and alter. The possibility of finding a public official's photograph, name, and address listed on a sex offender notification site is a problem. But, such sites also enable sex offenders to contact each other after finding information on the Web.

"That's a big [problem]," Mattson said. "You know how child pornography is such a big thing on the Net? Well, you have a mailing list of entire states full of sex offenders right at your fingertips." Such opening December 29, 1998, the Virginia site has received over 3.3 million hits. The volume has forced state officials to bring two additional servers online, said Capt. Lewis Vass, head of

that "most right-thinking people should feel a sense of moral outrage based upon the evidence that we were privy to. Unfortunately, the jury was not allowed to hear all that evidence."

The issue of the code of silence may yet be raised in court. Eight other guards stand trial in March on federal charges for shooting Corcoran inmates. ■

that state's criminal justice information services division. Even prisoners convicted of sex offenses are listed on the web site, along with their prison address, prompting Charles Riley, imprisoned at Nottoway Correctional Center in Burkeville, Virginia, to refuse to register as a sex offender for fear of retaliation.

In an unanticipated reaction to Megan's Law, two exclusive, gated communities in New Jersey voted to prohibit convicted sex offenders from buying property or living within their developments "I love children, and I am a woman," Kate Selich, a resident of another gated community, said, "and I am the last person that would want to see a [sex offender], but what are we going to do, put walls to keep them safe? How does this help anything?" And, in communities that already house convicted sex offenders, it seems real estate values are falling.

"The value of homes near houses identified on the Internet as sex offenders' homes are likely to decrease because many people do not want to move into a house near a sex offender," Rose Hochman, a Michigan real estate agent, wrote in a declaration submitted in a lawsuit against police for refusing to correct the address listed on their web site. The ACLU, representing plaintiffs Gayathri and Viswanath Akella, has expanded the suit into a class action. The Akellas bought the former home of a man listed as a sex offender on the Internet. The police failed to change the address on their web page at first, giving in only after the suit received widespread media attention. ■

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## CCPOA Runs Corcoran TV 'Ads'

The California Correctional Peace Officers Association (CCPOA), a union representing California prison guards, has launched a year-long campaign of 30-second television ads aimed at improving the public perception of Corcoran prison guards.

The five 30-second ads all begin with the line: "Corcoran officers: They walk the toughest beat in the state," and began airing on cable channels in the Fresno area in September, 1999. Only in Fresno, no other television market. And the ads are only about Corcoran guards, no mention of guards who work in other prisons.

The trial of eight Corcoran guards who were indicted on federal charges stemming from the infamous staging of gladiator fights was scheduled to begin in March, 2000. One month after the Corcoran TV ad spots debuted. In Fresno. Where the eight Corcoran guards face a jury trial.

Jonathan B. Conklin, assistant U.S. attorney, said prosecutors are concerned about the potential impact of the advertisements on jurors, who will all be drawn from the Fresno area. "Any attempts to taint the jury pool" before the trial would be taken "very seriously" by his office, Conklin told *The Fresno Bee*.

Jeff Thompson, a CCPOA representative denied that the commercials are designed to influence potential jurors. He said the TV spots are designed to "balance the impressions" created by "slanted" media reports.

"The idea is to get the rest of the word out to the public what it is these officers are dealing with," Thompson told the *Bee*. "Allegations raised by inmates get front-page treatment, but exonerations of officers never get any play, and it's unfair to officers." ■

Source: *The Fresno Bee*

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## Reviews

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### **With Liberty For Some: 500 Years of Imprisonment in America**

by Scott Christianson, Northeastern University Press, 1998

Review by Rick Card

Prisoners have played an important role in the entire story of America. From the founding of the New World by Christopher Columbus to the economic power of their cheap labor today, convicts are as germane to America as apple pie or baseball.

Scott Christianson's new book, *With Liberty For Some: 500 Years of Imprisonment in America*, paints a portrait of our nation that is both undeniable and fascinating. Christianson writes, "Starting in the early seventeenth century and continuing for 150 years ...an organized, international prisoner trade, of which the African slave trade was just one important part, provided the foundation for England's colonial wealth and America's identity." He concludes that "to the extent that American history is the story of immigration, then American colonial history is largely the story of the immigration of prisoners."

Citing a study by A. Roger Ekrich, Christianson highlights the conclusion that a quarter of all British emigrants to colonial America during the eighteenth century were convicts. A fact that positions America similar to Australia as an English penal colony-information unlikely to be found in any high school or college history book.

*With Liberty For Some*, however, is much more than mere history. It documents the emergence of imprisonment in our nation from the first state prison built in New York to today's massive prison-industrial complex. Along the way, Christianson introduces us to hundreds of individuals, from the obscure to the infamous to the beloved who have endured the cruelty and restraint of imprisonment.

Whether it was slavery, involuntary servitude, or criminal deterrence, this book explores how prison has been uti-

lized to create profit, foster economic growth, segregate people along economic and racial lines, silence political dissent, and promulgate the study of eugenics.

The book is held together by fascinating historical facts. For example, Christianson provides statistics from 1798 which demonstrate the return of two convicts set free from the first American prison. Alas! The birth of recidivism. And to underscore the point, he documents an immediate growth in the trend over the next six years, explaining that by 1803, 25 of the 155 prisoners at the state prison in New York were repeat offenders.

More than anything else, however, and without any special emphasis, Christianson weaves a thread of economic incentive throughout American's history of incarceration. Through the sale of convicts by the English to forced contract labor, he documents an unbroken chain of profiteering at the expense of the imprisoned which runs the entire 500 year span of American history and continues on to this day.

One feature that makes *With Liberty For Some* valuable is the number of rare facts unveiled. When portraying the treatment of many prisoners throughout the book, Christianson describes the use of agonizing devices such as the "iron gag," "shower bath," and "mad chair," each psychologically debilitating and potentially fatal. Other revelations, such as Thomas Edison's role in using the electric chair to execute criminals, rivets the mind to the true extent that imprisonment plays in our society's history. And finally, glimpses into the birth of popular criminal justice trends like three strikes, civil commitment, and the war on drugs gives these issues new dimensions.

Leaving no stone unturned, Christianson also focuses on the people who've served time in prison, a list including slaves, Indians, socialists, reds, feminists, as well as criminals. Daniel Boone, Sitting Bull, William Burroughs, David Crosby, Billie Holiday, Andrew Jackson, and Henry David Thoreau are only a few of the nearly two hundred names Christianson identifies as having spent time in American jails.

If there is any weakness in this book, it would have to be Christianson's reluctance to add any personal opinion or proposals-a loss considering the incredible depth of his knowledge on the subject. With the exception of general observations, such as, "...rates of incarceration are not necessarily related to, or a product of, official crime rates," and "Prison still serves the economic system. And serves it well," Christianson merely leaves it up to the reader to decide what to think.

Despite having academic features (1500 reference notes, over 80 bibliographical sources, and a wide index), *With Liberty For Some*, is far from pendent. Christianson's style is prosaic and humane, making friends with even the most resistant readers. And his clarity shines on from the first page to the last.

This book is a valuable resource for anyone seeking a completely unbiased look at America's history of imprisonment. A history that Christianson concludes is part of us all: "Five hundred years later, and it is still growing, spreading out further into the countryside, fastening itself deeper into the soil."

*With Liberty for Some* costs \$35.00 (hardback), plus \$3.50 shipping, from: Northeastern University Press, Box 6525, Ithaca, NY 14851.

### **The Keeper of the Keys by Lee Dickenson, Lost Coast Press, 1999, 161 pages**

Review by Rick Card

In a sequel to *The Sounding Tree*, published last year [PLN, May 1999], Lee Dickenson now offers a bundle of unrelated tales about his experience as a Connecticut prison guard. The stories range from administrative incompetence to prisoners on a rampage. And, as if to add another dimension, Dickenson also relates stories of guards that both enforce and violate the rules in tandem.

Despite what appears to be an equal dissatisfaction with superiors, colleagues, and prisoners within the Connecticut

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## Reviews (continued)

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Department of Corrections, a close read of *The Keeper of the Keys* demonstrates that Dickenson himself is as much to blame as anyone for the failures of the prison system.

"Experience has taught me to beware of anything that makes the inmates happy." What a statement! Dickenson shows his true colors by viewing prisoners as suspects based on nothing more than the smiles on their faces. Anyone who has served time knows the guards can't stand prisoners who are cheerful and content. Not only does Dickenson share this pervasive correctional attitude, but he thinks little of expressing it publicly.

While making some valid points about administrative corruption and general incompetence, Dickenson unapologetically relates a story about the Hartford Correctional Center, where he and his cohorts routinely moved prisoners from one side of the prison to another in order to comply with a court ordered population cap. Dickenson writes, "By moving them out of the main building before midnight and back again before six, we did not violate the capacity court order; not a bad scheme when you think about it."

If Dickenson was the responsible guard appalled at incompetence and corruption, as he relentlessly portrays himself throughout the book, how can he defend his willful violation of the spirit of a court order? And again, when physical force or chemical agents were used on prisoners, why doesn't he acknowledge his own unethical standards when coaching other guards about "what to write in their reports"?

The book offers one bonus that's worth mentioning: a glossary of over one hundred and thirty prison terms, which range from technical jargon to convict slang. It's both informative and amusing, and as a reference it's worth the price of the book.

While Dickenson finger points without much thought to his own actions, he must still be commended for speaking out. He acknowledges the unprincipled condition of our prison system and seems to understand that he is but another victim

in what is a growing prison industrial complex.

To order this book, contact: Lost Coast Press, 155 Cypress Street, Fort Bragg, CA, 95437. The price is \$14.95.

### **Gender and Justice: Women, Drugs, and Sentencing Policy**

A new study reveals a dramatic surge nationwide of women incarcerated for drug offenses - an 888% increase between 1986-96, in comparison to a rise of 129% for all non-drug offenses. The study by The Sentencing Project documents that while the women's prison population more than doubled during this period, drug offenses account for half (49%) of the rise.

The study, *Gender and Justice: Women, Drugs, and Sentencing Policy*, also examined the impact of drug offenses for women in three states - New York, California, and Minnesota -and found substantial variation among these states. In New York, almost the entire increase (91%) in women sentenced to prison from 1986 to 1995 was accounted for by drug offenses. In California, drug offenses represented 55% of the increase and in Minnesota, 26%.

Minority women have been disproportionately affected by the impact of drug arrest and sentencing policies. Of the women sentenced to prison for drug offenses in the three states, 91 were minorities in New York, 54% in California, and 27% in Minnesota, all substantially greater than the minority proportion of each state's population.

The study attributed the dramatic changes in women's incarceration to several factors: the impact of drug abuse on low income women; declining economic opportunities for many women; limited treatment options; and the harsh mandatory sentencing policies adopted in conjunction with the war on drugs. Overall, women in prison are disproportionately low-income, with low education levels, high rates of substance abuse (over 60%) and mental illness (24%). In addition, more than half have been physically or sexually abused.

Marc Mauer, Assistant Director of The Sentencing Project and co-author of the report, stated that "The war on drugs' and harsh sentencing policies

have combined to make a bad situation worse for many women. The unprecedented growth in the number of women prisoners affects not only women, but their thousands of children as well."

The study found considerable variation in the degree to which Hispanic women are affected by drug policies. In New York, Hispanic women were substantially overrepresented among women sentenced to prison for a drug offense in 1995 - 44% compared to their 14% share of the population - while in California, they constituted 31% of the population, but 25% of the women sentenced to prison for drug offenses.

The report also analyzed the impact of rising imprisonment on women and children. Two-thirds of women in prison are mothers to children under the age of 18, many of whom were heading single parent households prior to their incarceration. Half the women prisoners in a 1991 survey reported never having received a visit from their children while incarcerated. In most states, women convicted of drug felonies are now *banned for life* from receiving welfare or food stamp benefits, as well as financial aid for higher education.

The Sentencing Project called on policymakers to adopt several remedies for the growing impact of incarceration on women:

- ◆ repeal mandatory sentencing laws such as New York's "Rockefeller Drug Laws" which require a 15-year sentence for sale of two ounces or possession of four ounces of a narcotic drug;

- ◆ repeal the denial of welfare and education benefits for persons with a drug conviction;

- ◆ expand the availability of drug treatment both within and outside the criminal justice system; and,

- ◆ provide support for children of incarcerated mothers by improving parenting skills, providing greater access to treatment, and breaking the cycle of addiction and imprisonment.

The study, *Gender and Justice: Women, Drugs, and Sentencing Policy*, by Marc Mauer, Cathy Potler, and Richard Wolf, is available for \$8.00 from The Sentencing Project at 1516 P St. NW, Washington, D.C. 20005; (202) 628-0871.

## **Dean Injunction Clarified in Washington 35% Suit Wright Acted On**

**PLN** has extensively reported the state and federal litigation challenging the constitutionality of RCW 72.09.480. RCW 72.09.480 is the statute which allows the Washington Department of Corrections (DOC) to seize 35% of all funds sent to Washington prisoners. As reported in the August, 1999, issue of *PLN*, on May 17, 1999, King county superior court judge Gienna Hall ruled that RCW 72.09.480 was unconstitutional to the extent that it seized community property owned by the spouses of prisoners. The case, *Dean v. Lehman*, is a class action lawsuit filed by the spouses of prisoners.

Despite judge Hall's ruling, the Washington DOC continued seizing prisoners' money and stopped only after a contempt motion was filed. Ruling on that motion, the court held that the earlier injunction was not stayed and had gone into effect on May 17, 1999.

The court declined to find defendant Joseph Lehman, the DOC secretary, in contempt. Attempting to evade this ruling, the DOC continued seizing money sent to prisoners unless it had been sent to a married prisoner by their spouse. The *Dean* plaintiffs filed a second motion for contempt, contending that all funds received by married prisoners are community property and that the injunction should also protect unmarried prisoners because it violates equal protection to apply statutes based on a person's marital status.

On December 15, 1999, judge Hall issued an order clarifying her previous orders: "1) The court's May 17, 1999, orders on the parties' motions for summary judgment apply to all community property funds received by the incarcerated spouses of the plaintiff class. Regardless of who sends such funds to the incarcerated spouses;

"2) All funds sent to married inmates are presumptively community property, therefore funds sent to married inmates may not be subject to deductions under RCW 72.09.480 unless the defendants demonstrate that such funds are not community property and therefore not subject to this court's order;

"3) The court's May 17, 1999, orders do not apply to funds received by unmarried inmates;

4) The defendants may, but need not, requires inmates affirmatively to claim exemption from seizure under RCW 72.09.480 by showing evidence of marital status. Such evidence may, include, but is not limited to a copy of a marriage certificate or evidence of common law marriage in a state that recognizes common law marriages; and

"5) Defendants are not in contempt."

Under the terms of these orders, the Washington DOC must immediately return any funds seized from married prisoners after May 17, 1999, regardless of the source of the funds. The defendants have appealed the original ruling in this case to the state supreme court. Briefing has been completed and oral argument is scheduled to be heard in March, 2000. See: *Dean v. Lehman*, King County Superior Court, Case No. 97-2-12906-1 SEA.

The federal court class action suit, *Wright v. Riveland*, is still pending in the Ninth circuit court of appeals. After oral argument was heard in March, 1999, the court ordered the district court to clarify its dismissal order within 30 days. On February 1, 2000, the district court amended its earlier judgment and granted summary judgment to the defendants by holding that ERISA retirement funds are not exempt from seizure under the statute. Judge Burgess also directed the parties to present a plan to refund the prisoners' funds that were exempt from seizure.

At issue in the federal lawsuit are federal claims by prisoner plaintiffs which the district court dismissed for failing to state a claim. The district court's ruling that RCW 72.09.480 was void as applied to federal funds (i.e., 42 U.S.C. § 1983 judgments and settlements, Native American funds, etc.) was not appealed by the state and remains in effect for all Washington prisoners. The plaintiffs in both *Dean* and *Wright* are represented by Chris Youtz and Jon Meier, with the Seattle law firm of Sirianni and Youtz. ■

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# Washington DOC Settles Mail Censorship Suit

In early October, 1999, the Washington Department of Corrections settled a wide ranging lawsuit challenging various aspects of its mail censorship policies. *PLN* reported the filing of the suit in its November, 1997, issue. The lawsuit had publisher plaintiffs Humanists of Washington, the ACLU's National Prison Project and *PLN*. Prisoner plaintiffs included Jerry Hawkins, Mike Peterson, Randy Tollefson, William Harris, *PLN* contributing writer Mark Cook and *PLN* editor Paul Wright. The suit sought only injunctive and declaratory relief. The suit was later amended to raise other issues as the DOC expanded its censorship practices.

**"Bulk Mail":** The DOC agreed to deliver subscription publications regardless of the postage paid by the publisher, i.e., third or fourth class mail, also known as "bulk mail." The DOC had previously lost this issue in *Miniken v. Walter*, 978 F. Supp. 1356 (ED WA 1997)[*PLN*, Feb. 1998]. The settlement does not affect the DOC's practice of destroying, without notice to the sender or intended recipient, mail other than subscription publications sent via third and fourth class mail. That issue remains for further litigation.

**Gift Subscriptions:** The DOC agreed to allow prisoners to receive books and publications purchased or given to them by anyone except the friends and families of other prisoners. The DOC had previously lost this issue at the trial court level and on appeal. See: *Crofton v. Roe*, 170 F.3d 957 (9th Cir. 1999)[*PLN*, July, 1999].

**MIM Notes:** Since August, 1995, the Washington DOC had banned all issues of *MIM Notes*, the biweekly tabloid published by the Maoist International movement, claiming it advocated armed struggle. Under the settlement the DOC agreed to review each publication individually and presumably deliver it regardless of the armed struggle claim.

**Sexually Explicit Materials:** In the initial and amended complaints the plaintiffs had challenged the DOC's de facto ban on all sexually explicit materials. The plaintiffs agreed to dismiss this claim without prejudice since Ninth circuit rulings issued after the suit was filed made this claim unlikely to succeed.

**Infractions for Possession of Sexually Explicit Materials:** In settling the lawsuit the defendants agreed to amend WAC 137-28-260(728) which allows for the punishment of prisoners who possess sexually explicit materials as defined by the DOC. The amendment to the WAC makes the receipt of such items through the mail a complete defense to the infraction and splits the infraction into major and minor infractions. As part of the settlement plaintiff William Harris had an infraction he had received for possession of sexually explicit materials expunged from his record. Washington readers should note that this issue was never litigated before the case settled. Courts have repeatedly held that prison officials cannot punish prisoners for the exercise of First amendment rights such as possessing various written materials that are themselves not illegal (i.e., child pornography for example). See: *Larkins v. Oswald*, 510 F.2d 583 (2nd Cir. 1975) and *Sostre v. McGinnis*, 442 F.2d 178 (2nd Cir. 1971). Thus, while prison officials may be able to censor sexually explicit materials, it is probably unconstitutional to punish prisoners for the possession of non obscene sexually explicit materials. More so when one considers that Washington prisoners have been, and are, punished for writing sexually explicit letters to spouses, girl/boy friends, etc.

**Censorship Appeals:** The DOC agreed that the person ordering the censorship of an item would not be the same person to hear the appeal of the same censorship. The prisonrat hearing the appeal will be of higher rank than the initial censor.

**Specific Notice of Censored Items:** The DOC will tell prisoners when it has censored materials on grounds of being sexually explicit if it was due to pictorial, written, advertising or cartoon content.

The plaintiffs dropped their claim that due process requires that the prisoner be given an opportunity to examine mail censored for reasons other than its content in order to prepare censorship appeals. That issue remains for future litigation.

**Prisoner to Prisoner Mail:** The plaintiffs dismissed their challenge to the Washington DOC's ban on prisoner to prisoner mail. Readers should note that

in the context of legal assistance such a policy has already been found unconstitutional. See: *Storseth v. Spellman*, 654 F.2d 1349 (9th Cir. 1981). While the supreme court upheld a ban on prisoner to prisoner mail in *Turner v. Safley*, 107 S.Ct. 2254 (1987) the court left open the issue of whether such mail could be banned in the context of prisoners assisting each other with legal pleadings.

**Receipt of Legal Materials:** The DOC agreed to deliver court rulings, briefs, complaints, motions, etc., to prisoners provided they are mailed by a non prisoner and do not "threaten legitimate penological interests." Prior to the settlement the DOC randomly censored legal materials, such as court rulings, by claiming they "belonged to another inmate." This portion of the settlement only applies to the nine Washington prisons that have law libraries. It does not apply to camps and minimum security facilities. Prisoners in camps without law libraries who have such materials censored will presumably have to file suit on this issue as well. Under the settlement prisoners can also mail legal materials to brief banks in other prisons for inclusion.

**Stolen PLN's:** Prison officials at the Airway Heights Corrections Center stole copies of *PLN* sent to readers at that prison via first class mail and then introduced the stolen *PLN*s as exhibits to attempt to defeat the claims made in *Miniken*. The DOC agreed to replace the *PLN*s stolen from *PLN* subscribers Billy Blankenship and Randy Tollefson.

**IMU Publication Ban:** The plaintiffs dropped their challenge to the ban on publications for prisoners in levels I and II of Washington's Intensive Management Units (IMU). Under the guise of "property restrictions" the WA DOC bans prisoners in level I and II of IMU (there are four levels) from receiving books, magazines or newspapers). Under the settlement IMU prisoners who have publications withheld will be notified of the censorship. The DOC agreed to hold the publications for 90 days or until the prisoner subscriber is no longer on level I or II of IMU (or gets out of IMU), whichever happens first. The sender is not notified of the censorship. The DOC claims prisoners are never kept in level I or II of IMU for more than 90 days, there-

fore they should eventually receive their subscriptions and written materials. At this point, Washington is the only prison system in the country which bans all publications in its control units. The practice has been found unconstitutional in other states, by was upheld by the federal district court in Tacoma in a pro se suit filed by *PLN* subscriber James Koop. Further litigation is needed on this issue.

**Copies and Clippings:** The DOC agreed to allow prisoners to receive up to ten newspaper articles per envelope (it had been one), up to one magazine article per envelope (it had been none) and all carbon and photocopies that are not multiple copies of the same document (previously all copies had been banned).

**Postage Stamp Ban:** In September, 1999, the DOC banned stamps in all of its prisons. They had planned to charge prisoners 42¢ for embossed envelopes they were going to peddle in conjunction with their private business partners in "correctional" industries. The plaintiffs challenged this as well. The result was the DOC agreed to sell prisoners embossed envelopes at cost (35¢ each) and it got the legislature to amend RCW 72.09.480, yet again, to allow for a postage account so prisoners can have money sent in by outside parties for the purpose of buying postage without having any of it seized by the state.

After the suit was settled, and acting without any statutory authority, Eldon Vail, assistant DOC secretary, put a \$50 limit on the amount the postage account could hold. This more than likely violates the First amendment to the extent it impacts prisoners' ability to send out mail. The DOC has since admitted that its accounting system does not allow prisoners to buy the embossed envelopes from the prison commissary with money from their postage accounts. It violates the First Amendment to charge prisoners more to use the mails. This issue remains for further litigation as well.

The settlement went into effect on January 5, 2000. The defendants agreed not to seek dismissal for at least 30 months at which point they can seek dismissal under 18 U.S.C. § 3626(b)(1) of the Prison Litigation Reform Act. The plaintiffs can oppose such dismissal. The settlement is not a consent decree but a contract that can be enforced as such in state or federal court.

The DOC agreed to pay the plaintiffs \$61,541.00 in attorney fees and costs. The plaintiffs were represented by ACLU co-operating attorneys Joseph Bringman of Perkins Coie and Michael Gendler, of Bricklin and Gendler, both Seattle law firms. The lawsuit was sponsored by the ACLU of Washington and the attorney fees recovered in the action were donated to the ACLU to fund future litigation. *PLN* would like to thank Messrs. Bringman and Gendler and the Washington ACLU for

their efforts on behalf of the plaintiffs, Washington prisoners and those who correspond with us. Washington readers should note that the settlement does not bar or preclude other lawsuits on these issues, or lawsuits for damages. The settlement is unpublished. Anyone desiring a copy of it should send \$5.00 to *PLN* and specify what you want. See: *Humanists of Washington v. Lehman*, USDC WDAW, Case No. C97-5499FDB. ■

## Washington DOC Public Disclosure Overcharges Struck Down

On September 17, 1999, Spokane superior court judge Ellen Clark ruled that the Washington Department of corrections has been overcharging for Public Disclosure Act (PDA) requests. RCW 42.17 allows citizens to seek documents from state and local government agencies. RCW 42.17.300 allows agencies to charge "reasonable fees" for photocopies of such documents.

For years the Washington DOC has charged PDA requesters 35¢ per page for copies of PDA requests. While most government agencies in the state only charge 10-15¢ per page, the DOC charges a higher rate to discourage such requests and make it as expensive as possible for anyone to seek information about DOC operations. The DOC charged 35¢ a page for PDA requests pursuant to its own policy.

However, Washington Administrative Code (WAC) 137-08-110(2), allowed the DOC to charge only 20¢ per page for PDA requests. Derek Gronquist, a prisoner at the Airway Heights corrections center filed suit in Spokane County superior court after he was overcharged for a PDA request. Judge Clark ruled in his favor, finding a violation of the PDA. "The DOC published a fee, in the WAC, of 20 cents per page. There was no basis to charge the plaintiff 35 cents per page."

The court awarded Gronquist, who litigated the action pro se, \$450.87 in costs and expenses. The court denied Gronquist damages finding there was no bad faith on the part of the DOC. Instead, the court attributed it to "bureaucratic mismanagement."

The court granted Gronquist declaratory relief that the DOC was violating

WAC 137-08-110(2) by overcharging for PDA requests.

Faced with this defeat in court, the DOC has since published notice in the Washington State Register (WSR) that it intends to amend WAC 137-08-110(2) to charge 35¢ per page for PDA requests as well as significantly restrict the means by which prisoners and the public can make PDA requests, and eliminate the mechanism by which incorrect records can be corrected.

People who filed PDA requests with the DOC and who were charged 35¢ per page before this ruling was issued are entitled to a refund of the 15¢ per page difference. The DOC has already agreed to refund the 15¢ difference in PDA requests made by *PLN* editor Paul Wright from 1996 through 1999. See: *Gronquist v. Evans and DOC*, Spokane County Superior Court, Case No. 99-2-02113-9.

Washington readers are encouraged to write Kay Wilson Kirby, DOC Public Disclosure Coordinator, to protest the increase in PDA copying fees. No other state agency charges 35¢ a page for PDA requests. The full text of the proposed changes to the DOC's PDA WACs are found in WSR 99-14-017. Contact: Kay Wilson Kirby, DOC Public Disclosure Coordinator, P.O. Box 41114, Olympia, WA 98504; (360) 753-2345.

As *PLN* goes to press reactionary legislators have introduced HB 2458, which would bar prisoners from requesting any documents or information from any state or local government agency. Unwilling to comply with the law, the government response is to exempt itself from it. *PLN* will report the outcome of the legislation and WAC change in a future issue. ■

# New Folsom Year Long Lockdown

by W. Wisely

Northern California Mexican prisoners have been locked down since November 21, 1998, at New Folsom Prison's C Facility. The lockdown began when Northern and Southern California Mexican prisoners, long time enemies, fought on the yard. Ken Hurdle, an ombudsman appointed by California Department of Corrections Director Cal Terhune, talked with leaders for the Norteños in December, 1999, in an unsuccessful attempt to end the conflict, according to *The Sacramento Bee*. By the time Hurdle talked with the prisoners, they were on the third week of a hunger strike.

The Norteños were offered contact visits with their families, church services, and use of prison telephones if they agreed to talk with representatives from the Southern California Mexican prisoners in the first of several steps intended to return the prison to normal operation. "They rejected those conditions outright," Ken Hurdle said. The protestors said they would only share the yard with black prisoners. Northern California Mexicans and blacks are usually allied in prison. Prison officials refused to consider segregating the yard to keep conflicting groups apart. "Then you'd have two groups normally aligned on the yard at the same time. They would then only have staff as their 'enemy'," said Hurdle.

At least two prisoners showed health problems from the hunger strike, according to prison staff. Hurdle claimed no prisoner was getting sick because they had canteen and food from packages. "It's just that they're not accepting CDC food. That's why we're moving from calling it a hunger strike to a food strike."

The Norteños have support outside. "They're being held against their will by a government that has a history of massacring indigenous people," said Maria Ortiz, coordinator of the San Jose based Barrio Defense Committee. Maria's son is serving 16 years to life for second degree murder at New Folsom. She says letters received from the protestors state three prisoners have become sick, and one has kidney damage due to the hunger strike.

About 67 Norteños are involved in the lockdown. They've presented prison

officials with a list of 14 requests, including access to education and job training. One anonymous prisoner posted a message on the Internet describing the lock-down and denouncing prison officials and their policies as racist. "[I]f you are of Mexican descent and you have been tried, convicted and sentenced in a jurisdiction of Northern California, then you will be labeled a 'Northern Hispanic' inmate," he wrote. He described how Norteños were essentially in administrative segregation, although they had not been charged with violating any prison rule. Southern California Mexican prisoners, or Sureños, whites, blacks, and other ethnic groups had regular program and privileges during the past year. The official refusal to consider running segregated yards to avoid bloodshed is reminiscent of the integrated yard policy at Corcoran SHU that led to guards staging fights between prisoners for sport.

Prison officials threatened protestors with transfer to other prisons throughout the state if they don't agree

to sign a nonviolence treaty. "We don't want to make it an either/or-it's not an either/or," Hurdle claimed. "It's just another attempt to resolve this situation." But, Maria Ortiz described the ultimatum as retaliation. "They're just preparing to transfer them to Pelican Bay or High Desert. They're trying to cover up. They're trying to isolate them."

Citing California Governor Gray Davis' ban on all face to face media interviews with people in prison, the department refused to allow reporters for the *Bee* into the prison to talk with protestors. A bill, overwhelmingly passed by the California Legislature, which would've restored the media's ability to interview and correspond confidentially with prisoners, was vetoed by Davis late last year. Davis, who took millions in donations from the prison guards union, and gave the union president's daughter a high-paying government job, stated he didn't want to make celebrities out of criminals as his reason for vetoing the legislation. ■

## Class Certification Appeals Must Be Timely

The Court of Appeals for the Seventh Circuit held that parties seeking to immediately appeal decisions to grant or deny class certification must do so within the ten days prescribed by Federal Rules of Appellate Procedure (FRAP) 23(f).

Women prisoners in the Cook county (Chicago) jail in Illinois filed suit over a policy which required that all prisoners being processed for release from the jail be strip searched. The plaintiffs filed a motion for class certification which was granted on April 10, 1997. In August, 1998, the jail defendants asked the district court to decertify the class. The court denied the motion and the defendants immediately appealed even though no final judgment had been entered in the underlying case.

FRAP 23(f) allows for interlocutory appeals of decisions to grant or deny class certification. The rule states that

such appeals must be filed within ten days of the ruling being appealed. In this case, the defendants filed their appeal within ten days of the denial of their motion for decertification, but well past when the district court initially granted the motion to certify the class.

In a brief ruling, the court held that the ten day limit of FRAP 23(f) deprived the appeals court of jurisdiction because the appeal was untimely. The court held that having delayed filing their appeal, the defendants must wait for a final decision on the merits to be entered in the case before they can appeal the matter. To do otherwise would frustrate the purpose of the ten day limit in FRAP 23(f) which is designed to minimize the disruption to pending litigation. See: *Gary v. Sheahan*, 188 F.3d 891 (7th Cir. 1999). ■

## Michigan DOC Settles Lawsuit Over *PLN* Book Ban

In April, 1999, the Michigan DOC settled a class action lawsuit filed by Prison Legal News, Common Courage Press, and Michigan prisoners Larry Lynch and Calvin Holmes over the censorship of the *PLN* anthology, *The Celling of America: An Inside Look at the U.S. Prison Industry* (TCOA). Michigan Department of Corrections deputy director Dan Bolden had ordered TCOA banned from all Michigan prisons.

The book banning occurred after Larry Lynch ordered the book from *PLN* and Huron Valley Men's Facility case manager E.M. Ransom decided to censor it, claiming it advocated riots and violence against prison staff. Lynch appealed the matter through the Michigan DOC's grievance system, to no avail. When the appeal reached Bolden he affirmed the censorship of TCOA and added it to the list of books banned in all Michigan prisons.

*PLN* filed a class action suit contending that the statewide ban on *PLN* violated its First Amendment rights, those of publisher Common Courage Press and other book vendors, prisoners Larry Lynch and Calvin Holmes that had ordered the book and had it censored. The claims were also asserted on behalf of all Michigan prisoners who might wish to order the book in the future. The suit also claimed that the Michigan DOC's mail censorship system denied due process to the senders of censored mail as they are never afforded notice of the censorship or an opportunity to appeal.

Soon after filing the suit and a motion for a preliminary injunction, the Michigan DOC elected to settle the lawsuit. As part of the settlement the defendant prison officials agreed to pay *PLN* and Common Courage Press \$1,000 in damages each; \$10,000 in attorney fees and \$600 in costs. The

prisoner plaintiffs received copies of TCOA; TCOA was removed from the banned book list; a notice was posted in all Michigan prisons informing prisoners that TCOA was no longer banned and could be obtained from both *PLN* and Common Courage.

As part of the settlement the Michigan DOC agreed to change its mail censorship process so that whenever an item of mail is censored, the sender is given notice of the censorship and is told of their right to appeal the matter and where to direct the appeal. The settlement is unpublished. The parties settled before the court could rule on the plaintiff's preliminary injunction motion. See: *Prison Legal News v. Ransom*, USDC ED MI, Case No. CV-99-7052AC.

The plaintiffs were well represented in this action by Ann Arbor attorney Dan Manville. Mr. Manville is also the co-author of *The Prisoners' Self Help Litigation Manual*. ■

Tele-net

# Michigan Legislature Kills Class Action Suit by Female Prisoners

by Maia Justine Storm

In March, 1996, seven women prisoners filed suit in the Washtenaw County Circuit Court against the Michigan Department of Corrections, Director Kenneth McGinnis, and ten individual wardens and officers. (96-6986 CZ) The complaint alleged that the plaintiffs had all "been subjected to various degrees of sexual assault, sexual harassment, violation of their privacy rights, physical threats and assaults on their persons and retaliation by male employees of the MDOC during their incarceration." The plaintiffs brought suit under both the state Constitution and the Michigan Civil Rights Act (1976 PA 45), and were granted certification as a class on behalf of all women prisoners.

The factual claims include the following:

"In 1985 Defendant MDOC began staffing the housing units at all women's facilities with male officers and staff. . . [and] required male officers to supervise women prisoners while the women are performing basic bodily functions in toilets and showers and cells. Male officers and staff routinely enter the women's cubicle areas, showers and restrooms without announcing their arrival.

"Defendants required male officers working in plaintiffs' housing units to perform random and specific clothed body searches on women prisoners which include pat-downs of their breasts and genital areas.

"Defendants allow male officers to accompany women on transport to medical care and require said officers to remain and observe during gynecological and other intimate medical procedures.

"Women prisoners are routinely subjected to offensive sex-based language, sexual harassment, offensive touching and requests for sexual acts by male officers.

"There is a pattern and practice of male officers and staff sexually assaulting women prisoners in contravention of law and policy.

"There is a pattern and practice of male officers requesting sexual acts from women prisoners as a condition of retaining good time credits, work details,

educational and rehabilitative program opportunities, among other rights and privileges.

"Allegation of sexual assaults have and continue to be reported on a monthly basis.

"Defendants' employees have threatened and retaliated against women prisoners who have refused to participate in sexual activity with the employees, or who have reported staff sexual misconduct."

The trial court denied the defendants' motion for summary disposition; defendants were granted a limited leave to appeal. The major issue was whether the Michigan Civil Rights Act applied to prisoners. In *Neal v. Department of Corrections*, 230 Mich App 202 (1998), the Court of Appeals held that the Act did not apply to prisoners, although it did apply to visitors and employees. The Court held that prisons are not "places of public accommodation," nor do they provide a "service to the public."

Within months of this finding, the United States Supreme Court decided *Pennsylvania Dept. of Corrections v. Yeskey*, 118 S. Ct. 1952 (1998). At issue in *Yeskey* was the definition of "public entity" in the Americans with Disabilities Act (ADA), 42 USC Section 12132. A unanimous Court held that "the statute's language unmistakably includes State prisons and prisoners within its coverage." In *Neal v. Department of Corrections (On Rehearing)*, 232 Mich App 730 (1998), the Court of Appeals held, following *Yeskey*, that "the MDOC clearly falls within the broad statutory definition of a 'public service'." The women's class action suit was back on track, at least for the moment.

However, Governor Engler and the Michigan legislature were both smarting from extensive media coverage of the allegations of sexual assault against women prisoners. In addition to *Neal*, the Department of Justice also brought suit against Michigan, but reached a settlement last May after finding patterns of sexual abuse, assault, cover-up, and retaliation by the MDOC. [See *PLN*, February 2000]. In response, Engler and

the legislature pushed through two bills in December, 1999, with very little time for public input. One removes prisoners from the protection of the civil rights statute; the other removes them from the protection of the state disabilities statute. In a move many prisoners' rights advocates believe is unconstitutional, the bills were made retroactive in order to eliminate *Neal*, as well as *Doe v. Department of Corrections*, 236 Mich App 801 (1999). (*Doe* is a class action suit filed by the same attorney, Deborah LaBelle, on behalf of prisoners disabled by HIV/AIDS).

Act No. 202, Public Acts of 1999, signed by Engler on December 20, 1999, is explicit in its purpose: "This amendatory act is curative and intended to correct any misinterpretation of legislative intent in the court of appeals decision *Neal v. Department of Corrections*. [citation omitted] This legislation further expresses the original intent of the legislature that an individual serving a sentence of imprisonment in a state or county correctional facility is not within the purview of this act."

In its December 21, 1999, editorial decrying Michigan's move, *The New York Times* wrote: "The existence of potential federal remedies does not justify erasing state law protections. State officials usually chafe at federal intrusion into state institutions. The new Michigan legislation would invite that intrusion by forcing inmates to go to federal judges for relief. This egregious legislation attacks the basic rights of prisoners as persons under the law, and removes a powerful legal deterrent against prison abuse."

For the women plaintiffs in *Neal*, the statute of limitations has run, so they will have no legal recourse, in state or federal court. However, in what one attorney working on behalf of women prisoners calls "a wonderful victory," the current Director Bill Martin has recently decided to remove male guards from women's housing units — to protect the men, he claims, from false accusations of sexual misconduct. ■

[Maia Justine Storm is a prisoner rights attorney in Michigan.]

# No Liberty Interest in Erroneous Parole Release

by Paul Wright

The Court of Appeals for the Fourth Circuit, sitting en banc, held that a North Carolina prisoner had no liberty interest in remaining free when he was erroneously paroled, lived a law abiding life, and was then reimprisoned two years later when the mistake was discovered.

In the September, 1999, issue we reported *Hawkins v. Freeman*, 166 F.3d 267 (4th Cir. 1999) where the court held that Irving Hawkins had a right to finality in his sentence where he had been paroled and successfully reintegrated himself into society for two years. The court granted en banc review, and in a 10-1 ruling, reversed the panel and affirmed the denial of habeas relief. The full facts are recounted in the September, 1999, *PLN* article.

Hawkins was convicted of a drug crime as a habitual offender in 1981. He was not eligible for parole until 2018. The North Carolina Parole commission inaccurately calculated his sentence and released him from prison in 1992. After discovering their error in 1994, Hawkins was reimprisoned. While on parole he had abided by all parole conditions, maintained a job, etc. Hawkins sought habeas relief in the state and federal court systems which was denied.

In the en banc ruling, the appeals court held that Hawkins had no substantive due process right in remaining free. The court analyzed Hawkins' claim under the *County of Sacramento v. Lewis*, 521 U.S. 702, 117 S.Ct. 2258 (1997) "shocks the judicial conscience" test. As this ruling shows, when it comes to prisoners and parolees, most judges have little conscience. Simply put, the court held that Hawkins had no constitutional or statutory right to remain free on an erroneously granted parole.

The court rejected arguments that prisoners have a right to finality in their sentences and that the state waived its jurisdiction over his captivity by releasing him. The court noted that any remedies Hawkins may have lie in state common law principles or executive clemency.

Readers should note that, while not mentioned by the court in this case, other

courts have held that erroneously released prisoners do retain a due process right in their liberty and their sentences continue to run during erroneously granted paroles. See: *Schwitschenberg v. ADOC*, 951 P.2d 449 (Ariz. 1997). In this case however, the North Carolina courts had also rejected Hawkins' claims.

When it comes to limiting appeals and affirming convictions, especially death sentences, "finality in sentences" is uttered as a routine mantra as judges and prosecutors deny relief. The Fourth

circuit, according to the *Richmond Times Dispatch*, uniformly denies relief in all death penalty cases that appear before it. However, as this case shows, "finality in sentences" is another concept that is tossed aside like last week's garbage when it does not suit the purpose of results oriented judges and prosecutors. Apparently sentences should only be "final" when it means death or life in prison. See: *Hawkins v. Freeman*, 195 F.3d 732 (4th Cir. 1999)(en banc). ■

## PLRA Attorney Fees Cap Violates Equal Protection Clause

by Matthew T. Clarke

A federal district court in Michigan has held that the attorney fees cap in the Prison Litigation Reform Act (PLRA), codified at 42 U.S.C. § 1997e(d), violates the equal protection component of the Due Process Clause of the Fifth Amendment to the United States Constitution.

William Walker, a Michigan state prisoner, filed a civil rights suit under 42 U.S.C. § 1983 against prison officials alleging they retaliated against him for filing grievances and lawsuits. Following a jury trial, Walker was awarded \$1.00 against all defendants, \$300.00 against one defendant and \$125.00 against another defendant.

Walker then filed a motion for attorney fees pursuant to 42 U.S.C. § 1988, requesting \$36,046.25 in fees. Defendants responded, arguing that the PLRA's attorney fees limitation capped the fees at \$629.00. Walker replied, arguing that the PLRA's attorney fees cap was unconstitutional on vagueness and equal protection grounds.

The court ruled that, although situations in which the attorney fees exceeded 150% of the award were technically not covered by the statute, the PLRA's attorney fees limitation provision was sufficiently clearly worded for people of ordinary intelligence to understand. Therefore, it was not vague and could not be void for vagueness.

Although Walker challenged the PLRA attorney fees cap as violating the Equal Protection Clause of the Fourteenth Amendment, the court correctly noted that the Fourteenth Amendment cannot apply to a federal statute. However, the Fifth Amendment's Due Process Clause contains an equal protection component which is equivalent to the Equal Protection Clause and applies to federal statutes, permitting an equal protection analysis.

After an extensive and well-reasoned analysis, the court concluded that, because the PLRA attorney fees cap involves neither a suspect class nor a fundamental right, it is subject only to a rational basis review. The court noted that the attorney fees cap could not discourage prisoners from filing frivolous suits because attorney fees are only awarded to prevailing parties and a plaintiff bringing a frivolous suit could never prevail.

Therefore, the court held that § 1997e(d)(2) was unconstitutional even under this extremely deferential standard of review because there was no rational basis for the law and it involved no legitimate governmental interest. See: *Walker v. Bain*, 65 F.Supp.2d 591 (E.D.Mich. 1999). ■

## Third Circuit Evenly Split on PLRA Attorney Fee Cap

An equally divided *en banc* Third Circuit has barely upheld the constitutionality of the Attorney Fee Cap Provision of the Prison Litigation Reform Act (PLRA) 42 U.S.C. § 1997e(d).

Michael Collins brought suit alleging the defendants violated his constitutional rights when he was attacked by a guard dog while he was incarcerated in the Montgomery County (Pennsylvania) Correctional Facility. Prior to the passage of the PLRA, the district court appointed Collins an attorney. A jury awarded Collins \$15,000 in compensatory and \$5,000 in punitive damages.

The attorney fee cap in the PLRA limits attorney fees in prisoner litigation to a maximum of 150% of the hourly rate for court-appointed counsel under the Criminal Justice Act in the applicable district and a maximum of 150% of the judgment. It also requires that the plaintiff pay a portion, not to exceed 25%, of the fees.

Collins applied for \$80,122.75 in attorney's fees. The district court told him to recalculate the fees, applying the PLRA to fees for work done after passage of the PLRA. The revised fee request was for \$7,789.75 for pre-PLRA work and \$30,000 for post-PLRA work. The court approved those fees, requiring Collins to pay 2.5% (\$750) of the post-PLRA fees. Collins appealed, claiming that the PLRA should not apply retroactively to the suit and that the attorney fee cap unconstitutionally violated the Equal Protection Clause "by withdrawing from prisoners but not other plaintiffs the right under 42 U.S.C. § 1988 to an award of reasonable attorney's fees upon prevailing in a civil rights action. Collins contends that by 'virtually eliminating the potential for a prisoner's recovery of reasonable fees, the Act severely impairs the ability of prisoners to obtain counsel without similarly affecting the ability of non-prisoners.'"

The Third Circuit held that the requirement that the prevailing prisoner pay a portion of the fees could not be applied retroactively because the prisoner accepted appointment of counsel with the expectation that his fees would be paid by the defendants if the prisoner won the suit. Therefore, the court did not

address the equal protection claim regarding the prisoner being required to pay a portion of the fees.

In an equally divided *en banc* court, the Third Circuit also held that the provisions of the PLRA limiting the attorney's fees to 150% of the judgment and to no more than 150% of the fees paid court-appointed counsel under the Criminal Justice Act did not violate the Equal Protection Clause. In doing so, the Third Circuit did not reveal its reasoning, skirting the entire question rather than addressing the obviously prejudicial singling out of prisoners for "special treatment" by Congress. Readers should note that the equal division of the court indicates that Equal Protection challenges to the PLRA Attorney Fees Cap may be viable another day in another court. See: *Collins v. Montgomery Cty. Bd. of Prison Inspectors*, 176 F.3d 679 (3rd Cir. 1999). ■

**Inmate Classified**

**Kent Russell**

### Secret Tools for Post-Conviction Relief, 1999

Edition, by Joe Allan Bounds. "The Research Reference Book for Lawyers and Post-conviction Litigants for Prevailing on Ineffective Assistance of Counsel claims and, Methods of Establishing 'Cause' for Procedural Default." The Table of Contents has over 500 quick reference topics with favorable supporting federal case law. This book covers claims of Ineffective Assistance of Counsel, Conflict of Interest, Actual Innocence and much more!

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## CCA Facility Cited for Sex Scandal

On Sept. 17, 1999, Colorado Dept. of Corrections officials confirmed that they are investigating allegations of brutality, sexual misconduct and drug trafficking involving guards at the CCA-operated Kit Carson Corr. Facility in Burlington, which houses around 650 state prisoners. The investigation began in July but was not disclosed until it was almost complete.

Ron Alford, warden at the CCA prison, was suspended; kitchen manager Rocky Stewart was fired for undisclosed reasons; and CCA guard Shanna Turpin, 29, was charged with introducing contraband into the facility. According to a court affidavit, Turpin was also accused of engaging in a sexual affair with prisoner Moses Martinez.

"I don't know that I would characterize [the alleged misconduct] as isolated," stated Colorado DOC spokeswoman Liz McDonough, "but I don't know that I wouldn't characterize it as

isolated. We're talking about multiple allegations involving multiple people." McDonough said "a number" of the 200-person staff at the private prison had quit or been fired. CCA spokesperson Susan Hart declined to comment.

Up to fifteen female employees, including guards and nurses, are suspected of having affairs with prisoners since the Kit Carson facility opened in November 1998. Former guard Shanna Turpin said some employees sought relationships with prisoners for protection due to a staffing shortage. "We were looking for support we weren't getting from [other] officers," she said. "I was alone in charge of 228 male inmates, three pods, just me. I don't regret having inmates stand behind me."

The DOC investigation began following the brutal beating of a prisoner who had tried to escape: the beating by guards was witnessed by visitors at the facility. During a subsequent five day

lockdown prisoners reportedly were denied drinking water and showers, and were assaulted by guards. The investigation then uncovered extensive sexual misconduct at the prison.

"You just have to lay it at the feet of management if they're not clear that these relationships are inappropriate," said DOC spokeswoman McDonough. Under pressure from the Dept. of Corrections, CCA placed warden Ron Alford on administrative leave in August. "I'm good at being a warden. I'm good at my profession. I don't know why I'm sitting at home," Alford complained.

CCA's Kit Carson Corr. Facility has also been criticized for hiring Tasha Moore, 23, who had a prior felony record, as a guard. She later resigned. The state pays CCA approximately \$32,000 a day to house 647 prisoners at the facility. ■

Sources: *Rocky Mountain News*, *Corrections Digest*

## Brazoria Trial Brings Acquittals, Convictions in Jail Beatings

In October, 1999, a federal jury returned acquittals and a minor conviction against private prison guards charged with beating and abusing Missouri prisoners. As previously reported in *PLN*, some 100 Missouri prisoners were sent to the Brazoria county jail in Texas to relieve overcrowding in the Missouri prison system. The jail was operated by the Bobby Ross Group, a private prison company.

In 1997 a video surfaced, which was shown on national television, in which jail guards were shown beating and abusing prisoners. The incident led to several civil rights suits seeking money damages as well as a federal criminal prosecution.

In 1999 the U.S. government charged Brazoria jail guards Robert Percival, David Cisneros and Wilton Wallace with federal civil rights charges stemming from the videotaped beating of prisoner Toby Hawthorne.

Percival was acquitted of all charges, despite being on video kicking Hawthorne in the groin. The jury dead-

locked in Cisneros's case and convicted Wallace on misdemeanor charges for kicking Hawthorne in the head. Wallace has previous federal civil rights convictions stemming from abusing prisoners at the Brazoria county jail.

Brazoria county district attorney Jeri Yenne was critical of the federal prosecution. Yenne accused the FBI of covering up its own bloody misconduct at Ruby Ridge and Waco while vigorously prosecuting charges against the three jail guards in beatings that did not kill anyone.

It is interesting to note that when Los Angeles police were acquitted in the video taped beating of Rodney King there was widespread attention given to the case (in part due to the rioting that accompanied it). However, in another equally brutal and savage video taped beating, the acquittals meet with silence. ■

Source: *Corrections Digest*

## Wilson Group

# ADA and RA May Require Sign Language Interpreters

The U.S. Court of Appeals for the Eighth Circuit held that a deaf-mute prisoner stated a prima facie claim against the Missouri Department of Corrections (MDOC) for violations of the Rehabilitation Act (RA) and Title II of the Americans with Disabilities Act (ADA) for failing to provide him with sign language interpreter assistance. The court further held that a Missouri statute requiring sign language interpreters for state prisoners could not be used to definitively establish rights and duties under federal law, and that the Eleventh Amendment proscribed a federal injunction to enforce a state law.

Since 1983, Ronnie Randolph has been a state prisoner in the custody of the MDOC. He suffers from profound hearing loss and cannot understand most speech spoken at normal conversational levels. His primary means of communication is sign language.

During the course of his incarceration, Randolph has been confined, for the most part, to the Jefferson City (JCCC) prison, except for the period between 1989 and October 1996, when he was housed at Potosi Correctional Center (PCC).

Throughout this period, Randolph made several requests for the assistance of a sign language interpreter during various prison activities, primarily disciplinary proceedings. His grievance efforts proved fruitless and his administrative appeal were ultimately denied by the MDOC.

In May 1994, Randolph filed a civil rights complaint against the MDOC and several of its officials. His second amended complaint asserted five violations: (1) due process, (2) equal protection, (3) ADA, (4) RA, and (5) § 476.750 of Missouri statutes. The parties subsequently filed cross-motions for summary judgment.

In October 1996, Randolph was transferred back to JCCC. A year later, the district court dismissed his constitutional claims; and the ADA/RA claims against the individual defendants. However, the court granted summary judgment in Randolph's favor against all defendants on his state law claim, and against the MDOC on his ADA/RA claims.

A permanent injunction was issued requiring the MDOC to provide Randolph

"with sign interpreter services whenever he is the subject of a non-emergency disciplinary or classification hearing, during all non-emergency medical care, and during any educational programs." 980 F.Supp. 1051, 1064 (ED Mo 1997)[*PLN*, Oct '98]. The issue of damages was reserved for trial, but the defendants filed an immediate appeal.

On appeal, the first issue addressed was whether Randolph's claims were moot because he had been transferred from PCC back to JCCC. The court rejected this assertion on the grounds that Randolph's injunctive claims were against the MDOC. Regardless of where he is held, he was still an MDOC prisoner.

In reviewing injunctions, the court recognized four factors, which courts are required to balance. However, the defendants challenged only one factor, i.e., the "likelihood of success" on the merits of Randolph's ADA/RA claims, and review was limited to this point.

To state an ADA claim, an individual must show: (1) he is disabled, (2) otherwise qualified for the benefit, and (3) exclude because of his disability. The RA has the same elements, but imposes an additional federal funding requirement. Each statute is nevertheless vulnerable to an "undue burden" affirmative defense, which the defendants asserted.

The district court found that Randolph satisfied the elements of each claim, and the appeals court agreed. However, the district court relied on Missouri Statute §476.750 in determining that a sign language interpreter was a "reasonable accommodation," and not an "undue burden." This rationale was rejected by the court of appeals.

The court recognized that state statutes "cannot be used to definitively establish rights and duties under federal law." In addition, the court found the defendants had presented substantial evidence that Randolph's request "created safety and security issues," and placed "a financial burden on the prison." The MDOC was, therefore, entitled to a trial on the "undue burden" issue, and Randolph's "likelihood of success" was now in doubt. As a result, the court concluded that the district court should not have issued the injunction.

Lastly, the court recognized that the Eleventh Amendment prohibits federal

courts from ordering state officials to conform to state laws. Since Missouri has not waived its Eleventh Amendment immunity under § 476.750, the court determined that the injunction could not be enforced on state law principles, either. The case was remanded for further consideration. See: *Randolph v. Rogers*, 170 F.3d 850 (8th Cir. 1999). ■

## PLN On the Air

Every week *PLN* editor Paul Wright delivers prison news and commentary on radio station KPFA, 94.1 FM in San Francisco, CA. Titled *This Week Behind Bars* the show airs every Thursday or Friday between 5 and 6 PM as part of the *Flashpoints* program.

If your local radio stations aren't carrying any prison news or commentary ask them to carry *Flashpoints*. The show is available nation wide over a satellite feed. Straight out of the gulag. Radio stations interested in carrying the show should contact *Flashpoints* producer and host Dennis Bernstein at: (510) 848-6767.

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# Out-of-State Prisoner Housing Contracts Subject to Long-Arm Jurisdiction

Wilson Group

A federal court in Missouri has held that Missouri prisoners whose incarceration was contracted to Brazoria County, Texas, could sue Brazoria County in Missouri.

This is a lawsuit filed in Missouri federal district court by Missouri state prisoners who were abused while incarcerated in Brazoria County pursuant to its contract with Missouri. Both the beatings and the legal proceedings in Texas were previously reported in *PLN*. [See: "No Qualified Immunity for Texas Sheriff and CCRI Guards Who Abused Missouri Prisoners," *PLN*, August, 1999.]

The prisoners invoked jurisdiction under the Missouri long-arm statute, Mo.Rev.Stat. §506.500, to claim that they were third-party beneficiaries of the contract and Brazoria County had breached the contract. The prisoners also asserted an Eighth Amendment cruel and unusual punishment claim under 42 U.S.C. § 1983.

Brazoria County filed a motion to dismiss for lack of personal jurisdiction. The court held that, pursuant to *State ex rel. Deere & Company v. Pinnell*, 454 S.W.2d 899, 892 (Mo. banc 1970) and *State ex rel. Newport v. Wiesman*, 627 S.W.2d 874 (Mo. banc 1982), the long-arm statute extended jurisdiction of the Missouri courts to nonresident defendants to the extent allowable under the Due Process Clause of the Fourteenth Amendment.

"To come within the language of the applicable Missouri long-arm statute, the plaintiffs must show that Brazoria County entered into a contract in the State of Missouri. This is undisputed. The claims against Brazoria County, however, must also 'arise out' of that contract. Some of Plaintiff's claims are based on the contract itself and as to those claims long-arm jurisdiction is clearly established."

The Court adds, "The Missouri long-arm statute uses the term 'arises out of' and the U. S. Supreme Court uses the phrase 'arise out of or relates to' when it

analyzes the Due Process Clause in the context of specific personal jurisdiction. *Helicopteros Nacionales de Columbia, S.A. v. Hall*, 466 U.S. 408, 414 (1984)."

The court held that the similar language meant that the long-arm statute established personal jurisdiction of the Missouri courts over the other claims and "the only remaining question" was whether the Due Process Clause" permitted the suit.

Citing *Burger King Corp. v. Rudzewicz*, 471 U. S. 462, 474 (1985), the court held that the Due Process clause allows the suit if "the defendant purposely established minimum contacts in the forum state." The "minimum contacts must have a basis in 'some act by which the defendant purposely avails itself of the privilege of conducting activities within the forum state, thus invoking the benefits and protections of its laws.'"

The court held that the contract--which required Brazoria County to obtain written permission from Missouri officials for non-routine, non-emergency medical, dental, or psychiatric care; required immediate reports to Missouri officials of prisoner deaths or escapes; provided for the return of the prisoners to Missouri when their sentences expired; and specifically provided that the contract was governed by Missouri law and subject to litigation in its courts---met the requirement of minimum contacts.

Additionally, the court held that the exercise of jurisdiction was reasonable because it only placed a minimal burden on Brazoria County and Missouri had a strong interest in pursuing the suit in Missouri because transporting the prisoner witnesses, now incarcerated in Missouri, would be burdensome and present a security threat. Therefore, the court denied the motion to dismiss. See: *In Re Texas Prison Litigation*, 41 F.Supp.2d 960 (W.D.Mo. 1999). ■

Paper Wings

## News in Brief

**Bermuda:** On December 22, 1999, the British territory abolished the death penalty and corporal punishment.

**CA:** In December, 1999, Charles Scott was arrested by Kern county sheriff's deputies after they found 34 rifles and pistols, tear gas, stingball and flash bang grenades in his home. Police claim the items were all stolen from the California Department of Corrections. Scott claims he bought the items at a yard sale.

**CA:** On October 31, 1999, the state prison in Tracy was locked down after some 110 Latino prisoners engaged in a mass fist fight in the prison yard. Guards ended the incident with teargas and pepper spray. No serious injuries were reported.

**CO:** On December 7, 1999, Alfredo Serra, Gonzalo Martinez and Allan Lucero escaped from the Arkansas Valley Correctional Facility in Crowley by cutting and scaling prison fences. All three men were serving lengthy sentences for murder or attempted murder. Parolee Stacey Torres and Serra's mother, Diana Martinez, were arrested by police and charged with aiding the escape.

**Columbia:** On December 8, 1999, at least 11 prisoners were shot to death and eleven wounded in a shoot out between rival prison gangs at El Modelo prison in Bogota. Media accounts did not disclose the reason for the incident.

**CT:** On November 18, 1999, prison guard Raymond Portalatin reported to work at the Hartford Correctional Center. Supervisors claimed he was drunk and ordered him to go home. Portalatin was so keen to work that day that he fought three other guards to stay. He was arrested on charges of assaulting a public safety officer, interfering with an officer and threatening. Portalatin was hired by the state DOC in 1996 despite a 1989 conviction for felony drug possession.

**DC:** In November, 1999, the Justice Department announced it would give all 50 states and the District of Columbia \$1.8 billion in grants to build new prisons and expand old ones.

**FL:** In December, 1999, Duval county jail guards Katura Jennings, Hubert Hensley and Joseph Hardeman were rep-

rimanded for allowing prisoner Gary Neil to escape. Neil switched identification bracelets with Toriano Alexander after plying him with candy for several days before Alexander's release. Neil was released, then robbed three Hardee's restaurants, shot a policeman in the hand and killed a police dog. The guards were charged with incompetence.

**HI:** In November, 1999, former prison guard Steven McGuire, pleaded guilty to assisting an unidentified prisoner escape from the Oahu Community Corrections Center in exchange for money and drugs. McGuire pled guilty to being an accomplice to escape, promoting a dangerous drug, and hindering prosecution.

**Honduras:** On November 13, 1999, 11 prisoners were killed and 31 injured in fights between gangs at a federal prison in San Pedro Sula. The victims were all killed with knives and machetes. Press accounts gave no reason for the dispute.

**IA:** On December 31, 1999, two unidentified guards at the Ft. Dodge Correctional Facility were fired for handcuffing and spanking a prisoner on his birthday. The prisoner suffered minor bruises.

**IN:** In late 1999, John Barro, 48, a counselor at the Wabash Valley Correctional Facility in Carlisle, was arrested after he accepted three pounds of marijuana and \$1,000 in cash from an undercover police officer. The Indiana DOC assisted in Barro's investigation. Press accounts did not state if the drugs were intended for distribution within the prison.

**LA:** In July, 1999, state prisoner trustees at the St. John the Baptist parish broke into the jail's evidence room when the guard supervising them left to make a phone call. The trustees stole a dozen guns, marijuana and crack cocaine from the evidence room. When discovered, the trustees returned the guns but the drugs had been consumed. Responding to concerns by defense attorneys, prosecutors claimed the stolen drugs had only been from closed cases.

**Mexico:** On December 9, 1999, Protestant evangelical Indians stormed a Chiapas state prison in San Cristobal de las Casas with automatic weapons and

freed 44 of the prison's 239 prisoners. A five month old child visiting its father was killed and two guards injured in the assault.

**Mexico:** On October 22, 1999, 800 prisoners at the Center for Social Readaptation prison in Villahermosa, Tabasco, rioted. The riot left eight prisoners dead and two seriously wounded. The prisoners were protesting massive flooding that left the prison seven feet underwater, with no food and the prospect of the building collapsing. Authorities had previously evacuated 600 prisoners when the remainder rioted.

**MI:** In December, 1999, Michael Scott, a Correctional Industries shoe factory supervisor at the Parnall Correctional Facility was charged with six felony counts of giving drugs and pliers to prisoners Chris Sloan and Ronald Douglas in 1998. The prisoners used the pliers to cut through a prison fence and escape. Now testifying for prosecutors, Sloan and Douglas claim Scott was supposed to provide them with a get away car after the escape but didn't. Sloan has been suspended from his job with pay and remains free on bail awaiting trial.

**MN:** Cottonwood county assistant prosecutor Brian Pierce, 33, is unique in that he is one of the few prosecutors in the country who is a convicted felon that has served prison time. Pierce was convicted on three different occasions on various drug, burglary and fraud offenses and spent about 4 years in prison. Upon release, Pierce overcame his drug addiction, went to college and obtained a law degree.

**MS:** On September 8, 1999, Shannon Truelove was stabbed to death in Unit 32, the segregation unit, of the Mississippi State Penitentiary in Parchman. Truelove's father is a policeman. Truelove was killed while being escorted to recreation. His murder was the second in Unit 32 in a nine month period.

**NC:** In August, 1999, Pamela Robinson, a former secretary in the DOC, settled a sexual harassment Lawsuit for \$217,000; Robinson claimed Parole Division supervisor Robert Terry had fondled and propositioned her on numerous occasions. Then Robinson complained of

the harassment, DOC equal opportunity officer Alphonza Fullwood destroyed documents relating to the complaint and lied under oath about it. An unidentified assistant attorney general also helped conceal evidence in the case. The AAG was fired by the DOC and censured by the state Bar association. Fullwood's investigation claimed that Terry's conduct did not amount to sexual harassment.

**OH:** In November, 1999, Grafton Correctional Institution employees, John Chambers and John Williams, the prison's activities and food services directors, respectively, were indicted by a Lorain county grand jury on charges of theft in office. No other details were disclosed.

**OH:** On November 2, 1999, former Franklin Pre-Release Center guard Mallory Peterson, 33, was sentenced to five years in state prison after pleading guilty to five counts of sexual battery. Peterson admitted having sexual intercourse with three women prisoners and oral sex with two of them. Judge Patrick McGrath called Peterson a "sexual predator." As part of his plea deal, rape and kidnapping charges were dropped. While on bail awaiting trial for raping the prisoners, Peterson allegedly raped a 13 year old girl. He has been indicted on fourteen counts of rape and awaits trial on those charges.

**OH:** On November 3, 1999, Richard Hill, a guard at the Belmont Correctional Institution, was arrested and charged with luring high school boys to perform sex acts for display on internet web sites. During a police investigation into his activities, Hill also solicited an undercover policeman to perform sex acts for display on the internet.

**SC:** In November, 1999, prisoner Kenny Lambert, 36, was stabbed to death in the Lieber Correctional Facility. Prisoner Sammy Cowans, 28, is a suspect in the killing.

**SC:** On September 7, 1999, prisoners Wesley Floyd and John New took a secretary and teacher hostage at the Lee Correctional Institution. The hostages were released unharmed eight hours later in exchange for pizza.

**Switzerland:** On November 25, 1999, three small explosions damaged buildings owned by U.S. companies in Zurich. A group calling itself Freedom

for Mumia Abu-Jamal claimed responsibility for the explosions in a communique delivered to the U.S. embassy in Bern.

**Turkmenistan:** On December 27, 1999, the former Soviet republic abolished capital punishment, banned smoking and announced the release of 7,000 prisoners to celebrate the Muslim festival of Ramadan.

**TX:** On December 16, 1999, prisoner Darryl Brown was stabbed to death in the high security unit of the Federal Correctional Complex in Beaumont. In separate incidents in the medium security unit of the same prison that day, five other prisoners were injured in "skirmishes." Press accounts were sketchy and gave no reason for the incidents nor the identity of the wounded prisoners.

**VA:** On November 24, 1999, a federal jury in Richmond convicted DOC captain Jerry Givens, 46, of money laundering for a drug dealer. The jury found that Givens had put two vehicles in his name to conceal the fact that they belonged to cocaine trafficker Sylvester Booker, a longtime friend of Givens. Booker testified against Givens to reduce his own 27 year prison sentence. Givens had been employed at the Greensville Correctional Center in Jarratt where he was responsible for executing prisoners.

**WA:** On December 29, 1999, Daniel Jolliffe, 27, and Steven Henderson, 25, escaped from the Clallam Bay Corrections Center by scaling razor wire fences and leaving stuffed dummies in their bunks. Henderson was recaptured soon afterward outside the prison perimeter. Jolliffe, a former army ranger, was recaptured about 12 hours later when a guard found him hiding beneath a truck near the prison.

**WI:** On November 1, 1999, former Oshkosh Correctional Institution guard Derek Fuller, 28, pleaded guilty to delivering liquor, protein supplements and other items to prisoner Scott Seal. Prosecutors claim Fuller received at least one \$700 check from Seal at his home. It was not known if the money was to buy goods or pay Fuller for his services. Prosecutors were recommended a 5 month jail sentence and probation.

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## California's No Parole Board

by Marvin Mentor

With no change in the statutory standards for lifer parole hearings, the CA Board of Prison Terms (BPT) has reduced its rate of parole grants from 50% in 1978 to 0.2% in 1998. In April, 1999, newly elected Governor Davis (who has the constitutional power to recommend BPT en banc review of any lifer parole hearing decision, and to personally overrule any murder-lifer parole decision) told the *Los Angeles Times* that he would not release *any* murderer, not even of the 2nd degree with extenuating circumstances, under his newly announced personal credo that if you

take a life, you do "life". In so doing, he and his hand picked (no)parole board have dissolved the distinction between all degrees of murder, and have unilaterally retrospectively resented all such prisoners to life without the possibility of parole (LWOP). Of California's 166,000 state prisoners, the BPT has discretionary parole authority over the approximately 20,000 indeterminately sentenced "lifers". (All other California prisoners have determinate terms and are automatically released thereafter onto three years of parole, unless they are instead civilly committed as "sexual predators" or "mentally disordered offenders").

It is no secret that the shut-down in paroles is not due to any change in the law or regulations governing paroles, but solely to political posturing by candidates for public office and by the special interest groups that support them, including the largest election campaign funds donor in California, the prison guards' union. The knee-jerk reaction to some highly publicized murders has spawned not only the 7 fold increase in prison population in the 1978-1998 period, but has fomented the expanded application of life top sentences and new laws such as "3 strikes" - which allow the politicians to lock up for 25 years to life such menaces to society as pizza thieves and ex-offenders failing to timely reregister their new domicile.

The governing statutes, CA Penal Code §3041 et seq., have for those same 20 years required the Board to "normally" fix terms at a lifer's first hearing. In 1978,

the Board did so: The parole grant rate was about 50%. Even then, recently commuted death row prisoners were paroled. After Republican Governor Deukmejian took office, the rate dropped sharply to about 5% by 1985. Later, Republican Governor Wilson put his imprimatur on the Board by guiding them to a precipitous drop in parole grants from 5% in 1990 to 0.2% in 1998. But the hidden story is worse. That same Wilson Board between 1992 and 1995 rescinded 85 grants of parole while granting only 46. (BPT Lifer Hearing and Decision Information, Oct. 1, 1998.) In other words, the Board was playing a shell game with their "parole" statistics. While they purported to be "granting" parole dates, they were in fact setting long dates and rescinding them quietly in subsequent years, almost always under the guise that the earlier panel had "improvidently granted" parole. The actual lifer release statistics are more sobering: fewer than 10 prisoners for each of the years in the early 90's. One second degree murderer, Billy Jo McIlvain, an ex-cop, was ordered released by the Governor at the minimum term, over the objections of the BPT and the prosecuting district attorney. All other governor's decisions have been to overrule the few BPT grants of parole. But even these sparse releases are no longer available under Gov. Davis.

Numerous sub-groups of affected lifers have cried foul. The oldest group (numbering 700+), sentenced to 7 to life for first degree murders before November 8, 1978, has now served well over 20

### Inside

Massachusetts Guards Fired	3
No Sexual Abuse in Virginia	4
From the Editor	5
Murder Charges for Florida Guards	8
Texas Guard Killed	9
Louisiana Escape Attempt	10
New York Strip Searches Illegal	12
HIV+ Segregation Okay	14
Turkish Political Prisoners Killed	16
ADA Applies to Parole	19
STG Isolation Okay	21
Arizona Porn Ban Upheld	24
News in Brief	28

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## CA No Parole (continued)

years. Their lucky counterparts who paroled in earlier years served from 10-13 years, in accordance with the Board's published "matrix". When these "old law" lifers were sentenced, the statutory purpose of incarceration was "rehabilitation". That purpose was subsequently amended to "punishment". (CA Penal Code §1170(a)(1).) Although these lifers have been both rehabilitated and punished by now, they are still being denied parole. The Board today ignores the fact that they have exceeded their own (unchanged) "matrix" terms for these crimes and routinely finds them unsuitable. The "reasons" for unsuitability range from "the gravity of the offense," to "get therapy," to "upgrade vocationally and educationally," to failure to confess to degrees of offense or ancillary acts they were not convicted of - in blatant violation of CA Penal Code §5011(b), which expressly exhorts, "The Board ... when setting parole dates, shall not require an admission of guilt to any crime for which the inmate was not committed."

The next most numerous group of eligible lifers is the post-1978 second degree murderers (numbering over 5000), sentenced under the "new" 15 to life law. While some of these were paroled in the early 90's (fewer than 10/yr. According to *California Prisoners and Parolees*, CDC, 1992-1996), they too are now being stonewalled by the above-mentioned rescissions, boilerplate unsuitability findings and/or Gov. Davis' stranglehold on releases.

Finally, there is the identifiable group of those sentenced to 7 life for kidnap/robbery. Even when their crime resulted in no one being physically hurt, the Board is simply passing them over.

What has caused this shutdown of lifer paroles in California? Certainly not any change in the parole laws, CA Penal Code §3041 et seq.'s standards remain the same. The most telling clues come from insiders.

For example, ex-Attorney General Dan Lungren, in his final TV debate on Oct. 15, 1998 while running for Governor, reminded the electorate that the candidate they pick for governor, in turn, has the power to pick key state officials. He gave as his example the Board of Prison

Terms appointees, and bragged that the previous two Republican governors had culled the nominees for biased, loyal henchmen: "The current board ... releases on average 0.5%. One half of one percent. In other words, the difference in appointments is the difference between sixty times as many people going out there in the first year." So the "fair and impartial" hearings supposedly given all lifers have been admitted by the top law enforcement official in California to have been prejudicially predetermined by "rigging the jury."

An ex-Commissioner of the BPT, Mr. Albert Leddy, testified on April 29, 1999 at an Informational Hearing on Board abuses before the CA Joint Legislative Committee on Prison Construction and Operations that "it finally got down to where the then-chairman Gillis told two of the commissioners, 'Stop giving these dates. You're giving too many dates.'" So, it was a gradual build-up of pressure to deny.

Even ex-California Supreme Court Justice Cruz Reynoso, after representing a lifer at a hearing, testified to the same Committee that "the derisive attitude of the panelists who were there, a predetermination, it seems to me, of the case before they heard anything from the prisoner or from counsel. They clearly in my view, did not listen to what the prisoner was saying or what the counsel was saying."

What is being done to challenge this travesty of justice? The CA Legislature is trying to pass SB-128, a bill that would require the Board to do its job. In the face of a presumed veto by Gov. Davis, the Legislature is posturing for sufficient support to override the veto. Gov. Davis, on the other hand, is crippling the parole process on both ends: On the one hand, he has overridden or remanded for board review every date granted during his regime (13, according to a *San Jose Mercury News* editorial). On the other hand, he has left unfilled 4 of the 9 commissioner positions, cutting the Board's annual schedule of about 2100 hearings in half. Two commissioners he has appointed are male ex-law enforcement officers, versus the cross-section of the community requirement of CA Penal Code §5075. Reacting to this obvious flaunting of state law, State Senator John Vasconcellos, Chairman of the Senate Public Safety Committee, vowed "I won't

vote to approve another man on this Board until half of them are women. You can tell the Governor or tell the world."

This leaves the courts seemingly as the only available avenue for recourse. But, stacked with 16 years of Republican governors' appointees, the courts have been loathe to get involved. Recently, there has been some whittling away at the malevolent obfuscation of the Board that prevented prisoners from getting to court to challenge their parole denials. The Board had the nasty habit of withholding the needed record of the hearings, the transcripts, for up to a year. Recent proper litigated court actions have required the Board to produce the transcripts within 30 days. See, e.g., *In Re Pratt*, (1999) Marin County No. SC105058A. Another ruse was to simply not answer the administrative appeals of lifer parole decisions, leaving the prisoners unable to exhaust the requisite remedies to be able to go to court. The Marin County, CA Superior Court, responding to a proper writ complaining of no administrative appeal answer after four years, crafted a 120 day time limit for such answers when the BPT did not commit to any limit on its own. *In re O'Connell* (1999), Marin No. SC 103339A.

Gov. Davis' obstructionist policies are now being challenged in court as well, where prisoners are complaining that the delays in their (now long overdue) hearings violate the maximum denial periods specified in CA Penal Code §3041.5(b)(2), and thus amount to a denial of due process of law. That is, since the law (PC §3041 et seq.) presumes suitability, but one cannot gain the minimal process due of a hearing, one should be statutorily released if he has served his "matrix" term. Although the BPT has argued back to the courts that the law does not presume suitability, BPT Chairman Nielsen admitted that it does, upon questioning by Senator Vasconcellos in the April 29, 1999 hearing.

The daunting task of challenging the BPT in court falls largely to the unrepresented prisoners. State appointed hearing attorneys can ill afford to litigate appeals for their clients, when the BPT pays them only \$23.75 per hour, for a maximum of six hours, for each prisoner. With BPT commissioners comfortably compensated at over \$92,000/yr. plus benefits and per diem (not counting their retirement benefits

from earlier government service), the Governor, backed by \$2 million in campaign fund donations from the guards' union plus the proceeds of a recent \$3000/head fundraising golf tourney hosted in his honor by the union (whose membership, in turn, recently benefited from \$240 million in annual compensation package improvements), and selected legislative candidates sharing in another \$1.9 million of the union's donations, the playing field is hardly what one would call level.

The end game of the CA lifers' retrospective executive branch resentencing to LWOP is far from clear. The Democrat controlled CA Legislature is stymied by the vetoes of a campaign fund driven

rogue "Democrat" Governor; the state courts are stacked with largely conservative appointees from the previous 16 years of Republican governors; and Gov. Davis is reportedly appointing only affirmatively pro death penalty jurists today.

The statutory standards for lifer parole releases have not changed in the past twenty years - only the politics have. Until candidates for public office find a richer source of political capital than the aging lifer population, they will continue to feed off of the lifers' state law created parole rights via their loyal hand picked (no)parole board in shameful disregard for the very laws these candidates seek public office to allegedly uphold. ■

## Guards Fired in Massachusetts Sex Abuse Cases

Four guards were fired from the Suffolk County House of Correction in Boston in August and October 1999 on charges that they had sexual contact with female prisoners. One of the prisoners became pregnant in what was described by the *Boston Globe* as a "guard-inmate drugs-for-sex ring." The charges rocked the Suffolk County Sheriff's Department and spurred multiple lawsuits, and prompted investigations by the FBI and Suffolk County District Attorney's Office.

In November 1999 guard union members, who had remained shamed and largely silent as four of their own lost their badges, erupted in outrage after Lieutenant Alvin Boudrow was fired in connection with the scandal. According to union officials and Lt. Boudrow's attorney, he was fired after he jokingly used the phrase "tip of the iceberg" in a conversation with a superior.

In an interview with the *Boston Globe*, Suffolk County Sheriff Richard J. Rouse defended the firing. He said that the manner in which Lt. Boudrow conveyed the comment—saying it twice to Special Sheriff Brian Byrnes as they passed the women's unit of the jail where the sex abuse occurred—indicated that he knew about other possible instances of abuse. When Rouse asked Boudrow to file reports about any further misconduct he knew about, he said the Lt. refused to elaborate.

Also in November 1999 a guard at the state prison for women in Framingham, Mass., was charged with

raping two prisoners after DNA evidence from one of the alleged victims matched a sample of his blood. On two separate occasions in October 1998, MCI Framingham guard Anthony Maddix allegedly had female prisoners released from their cells, saying they were to report to the prison medical ward. Instead, he took them to an isolated area and forced them to perform oral sex, a Middlesex County prosecutor told the *Boston Globe*.

A spokesman for the Massachusetts DOC called the arrest an "isolated" event despite reports of sexual misconduct at other Massachusetts prisons and a recent report by Amnesty International that asserted that Framingham's women's prison was plagued by increasing numbers of guards trading cigarettes for sex.

"This was an isolated incident," DOC chief Anthony Carnivale told the *Boston Globe*. "This is the only individual involved. As soon as the matter was brought forward, we investigated." As to the allegations raised by Amnesty International in its March 1999 report, Carnivale called them false and "outrageous".

But Massachusetts lawmakers took the problem more seriously, passing a law in November 1999 criminalizing even "consensual" sex between guards and prisoners. Passed as an amendment to the budget, the law makes any sexual contact between guards and prisoners a felony punishable by up to five years in prison, a \$10,000 fine, or both. ■

Source: *The Boston Globe*

## Virginia DOC Says 'No Pattern' of Sexual Abuse

In 1999 the Virginia Department of Corrections conducted an internal review of 44 complaints of sexual assault, harassment and fraternization between prisoners and staff of the Fluvanna Correctional Center for Women, all since the prison opened in April 1998. Even though 13 employees have been fired or resigned due to sex abuse allegations, the DOC concluded that there was no pattern of sexual abuse.

Of the 44 incidents reviewed, 29 were investigated by the DOC's Inspector General's Office, while 15 allegations of fraternization were considered minor enough to be referred to FCCW warden Patti Leigh Huffman's office.

Of the 29 cases investigated, 16 involved sexual assault or harassment (the other 13 were fraternization allegations). Of those 16, four were determined to be founded, six were unfounded, one was inconclusive and five were pending further investigation at the time of the report.

A total of 13 prison staff were either terminated or resigned, five cases were referred to the Fluvanna County commonwealth's attorney for possible prosecution and one former employee was indicted, said the report.

Yet the report - written by the DOC Inspector General's Office - concludes that "There is no pattern of sexual assault/harassment at FCCW .... Our assessment is that management took appropriate disciplinary action following the completion of the investigations."

Just before he stepped down as chairman of the Virginia Board of Corrections in October 1999, Andrew J. Winston sharply criticized the administration for ordering only an internal investigation, likening the probe as "allowing a fox in a chicken house."

But the report was defended by Gary K. Aronhalt, the state's secretary for public safety, who said, "I think the report is thorough, professional and I really didn't expect anything else."

Notably, the report was also defended by Peg Ruggiero, of Friends of Incarcerated Women, who said, "I think that this sounds like there was a thorough job done and that it's fair and that the best way to continue to deal with this issue is the way that [the warden,

Huffman] has and that is to bring it out in the open."

But FCCW prisoner Bobinette Fearce told the Associated Press in October that the number of reported (and investigated) sexual abuse cases is "the tip of the iceberg... in this little cesspool [of] seductions."

As Amnesty International has pointed out, it is difficult to gauge how pervasive the problem is because most prisoners are afraid to file complaints because of fear of retaliation. "If we speak out, other officers agitate you, write you tickets," FCCW prisoner Yolanda Gross told *The AP*.

The DOC Inspector General's report seems to bear this out. "As a result of investigations..." said the report, "15 inmates received institutional charges for making false statements about staff."

Although the review concluded there was no pattern of sexual abuse it contained a series of recommendations that included: adding more video cameras in the general population housing units; ensuring the correct mixture of male and female staff members for various posts; rotating the staff between housing units to discourage familiarity that could lead to fraternization; and rotating staff assigned to supervise prisoner work details for the same reason.

Human rights groups have said that the only way to eliminate the problem is to have all-female staff in women's prisons. FCCW warden Huffman said that is impossible because of equal employment laws, but added that she welcomed a law that went into effect July 1, 1999 making it a felony punishable by up to five years in prison for guards to have sex with prisoners.

On October 27, 1999, a Fluvanna county grand jury indicted DOC guard Richard K. Robinson for exposing himself to women prisoners at the Fluvanna Correctional Center for Women. The indictment states that Robinson "unlawfully and intentionally made an obscene display or exposure of his private parts in a public place or in a place where others are present." ■

Sources: *The Associated Press*, *Richmond Times-Dispatch*

## No Qualified Immunity for Unsafe Working Conditions

A federal district court in New York held that a risk of future harm to a prisoner from dangerous chemicals at his prison job violates a clearly established right, from which prison officials are not immune. The court further held that the statute of limitations in these matters does not begin to run until the exposure is discovered.

From July 1989 until he was transferred in November 1991, Clifton Crawford was a New York state prisoner assigned to the Corcraft metal shop at Attica Correctional Facility. During this period he worked at an assortment of jobs, including 16 months as a spray painter.

On July 6, 1994, Crawford sued seven prison officials for exposing him to dangerous chemicals while he was working for Corcraft. The parties consented to magistrate proceedings, and the defendants moved for summary judgment on three theories.

The first issue focused on the involvement of the various defendants. The magistrate found that Crawford's pleadings failed to show personal involvement for four of the officials. As a result, those four were dismissed.

Next, the court recognized that prisoners are protected under the Eighth Amendment from the threat of future harm that may be caused by exposure to toxic substances. Thus, the defendants' immunity turned on their awareness of the condition and whether they responded appropriately.

On one hand, the defendants claimed they furnished state-of-the-art safety equipment, complied with applicable regulations, and provided ample safety training. Crawford, supported by affidavits from fellow Corcraft workers Joe Stafford and Lynwood Johnson, disputed each of these claims. The resulting factual dispute precluded a grant of qualified immunity.

Last, the defendants argued that any claims prior to July 6, 1991, were barred by the statute of limitations. The court rejected this defense because the statute of limitations is not tolled until the time the risk is discovered. In conclusion, the court issued a series of pretrial orders. See: *Crawford v. Coughlin*, 43 F.Supp.2d 319 (WD NY 1999). ■

# From the Editor

by Paul Wright

As this issue goes to press it is too early to have received any response on the matching grant campaign. Between May and January 2001, each issue of *PLN* will contain a bar graph showing how much has been donated to date and how much we need to raise to get the entire \$15,000. We hope readers will contribute so we can continue to afford a second staff person.

Fred and Linda, *PLN*'s office staff, want to remind readers that because *PLN* is mailed via third class mail, the post office does not forward *PLN* if you move. Instead, each issue is returned to *PLN* and the post office charges us 55¢ for each returned copy. If you move, or plan to move, please notify the *PLN* office immediately. Some prisons and post offices wait several months before returning undelivered copies of *PLN*, if they do at all, which is our only way of knowing you have moved if you don't tell us.

We only replace undelivered copies of *PLN* to institutional subscribers. Anyone else needing replacement copies of *PLN* due to a change of address needs to reimburse the postage.

*PLN*'s office staff requests that prisoners not ask them for legal advice. As Fred says, he is not a lawyer. *PLN* has no legal staff. Second, Fred and Linda are very busy with the day to day business of keeping *PLN* running. Their other complaint is that prisoners frequently send large bundles of legal documents, asking for advice. Bundles they lack the time to read or do anything with. If you win or settle a case, send us the ruling or the settlement. If we need more information we will contact you for details. Do not send wads of paper or lengthy pleas for legal assistance on criminal cases.

Fred asks that correspondence to *PLN* be kept brief and to the point. If you have a question about your subscription that requires a response please include an SASE.

Next month will mark *PLN*'s tenth anniversary and 121st consecutive issue of publication. After ten years I have a confession to make: I hate writing these "from the editor" columns. When we first started out, Ed Mead (*PLN*'s co-founder

and I wrote an editorial in every issue. We then started alternating issues so I would only have to write an editorial six times a year. Now, as sole editor I am writing the editorials each month.

A number of people responding to our reader survey said they didn't care for the editorial. Some months, like this one, I don't have anything especially profound to say. Traditionally, *PLN*'s monthly editorial has been a way to let our readers know what is happening with *PLN* the magazine. The editorials have chronicled our growth, crises and thoughts and feelings of the day.

One constant in ten years of editorials is the constant begging for money. While we don't rival public television at times it feels like we are. In a perfect world there would be no need for a magazine like *PLN*. In a less than perfect world, *PLN*

would have ample funding and resources. But, we don't. We have had to rely on the financial support of our readers just to get this far.

Besides the fact that I hate constantly asking our readers for money, the incessant quest for funding and perpetual financial crisis means there is less time to do what we should be doing: publishing a top notch advocacy magazine. If and when *PLN* is financially solvent there will be no more editorials begging for money. If you hate the begging as much as I do, then help *PLN* meet its fundraising goals so I can stop asking you to donate money each month!

Please let others know about *PLN* and encourage them to subscribe. Increasing our circulation is another way to keep *PLN* financially solvent. ■

## Warrant Required Despite Private Prison Contract

The Court of Appeals for the Fifth Circuit held that a home detainee's contract with a private confinement company allowing warrantless home searches was invalid under Louisiana law. Therefore, any evidence from a warrantless search of his home was properly suppressed.

Joshua Francis was sentenced to two years in jail, with home incarceration, after pleading guilty to cocaine charges in Louisiana state court. Louisiana Home Detention Services (LHD) is a private company that monitors people assigned to home incarceration. It has a contract which it requires defendants to sign. Among the standard contract conditions are a clause where the defendant "agrees" to submit to warrantless home searches by LHD staff. Failure to consent to such searches will lead to imprisonment.

Local police received anonymous tips that Francis was dealing drugs from his home. Police contacted LHD about their ability to search Francis's home without a warrant. LHD then went to search Francis's home "with police assistance" and a police drug dog. When police arrived Francis told them he could not give consent to a search of the home as it belonged to his girlfriend. The girlfriend

initially denied consent to search but changed her mind when police told her they would search anyway. The search found a pistol, drugs and cash. Francis was charged in federal court as a felon in possession of a firearm. The district court suppressed the evidence and the appeals court affirmed.

This ruling is of increasing importance given the proliferation of private companies undertaking the incarceration and supervision of criminal defendants and prisoners.

In its brief ruling, the court held that under Louisiana law, sentencing courts must specify the conditions of home incarceration. In this case, the sentencing court did not impose a search condition on Francis. Therefore, the LHD contract stating otherwise was "illegal and nullity under Louisiana law." Police and LHD had no lawful authority to conduct a warrantless search of Francis's home. The court declined to find that the police acted in "good faith." This was based on a police officer's testimony at the suppression hearing that he did not believe the LHD contract allowed the search. See: *United States v. Francis*, 183 F.3d 450 (5th Cir. 1999). ■

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## Reviews

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### **Discovering America As It Is by Valdas Anelauskas, Clarity Press, Inc., Atlanta, Georgia, 1999, 584 pages**

Review by Hans Sherrer

*Discovering America* is Valdas Anelauskas' challenge to the oft heard claim that America is the greatest country in the world.

As a former Soviet dissident who emigrated to the United States ten years ago with stars in his eyes, Valdas Anelauskas is uniquely qualified to write a book that looks at America from a perspective different from the one promoted by *Time* magazine and Kathy Lee Gifford.

Two of this country's flaws that Anelauskas focuses on are that it's not as free as people in Russia are led to believe, and it has a class structure organized by one's economic condition, social standing, and political connections. These observations about defects in American society aren't original, but they have special meaning because of his background.

The most ardent supporters of what Anelauskas refers to as American capitalism readily admit that there is not and never will be economic, social, or political equality in this country. However, they religiously advance the "rising tide" theory of prosperity and social justice. That theory is based on the notion that everyone in society benefits from the accumulation of wealth by members of the upper economic classes, just like all sizes of boats are raised by an incoming tide.

*Discovering America* challenges the "rising tide" theory by using examples to show that lower and middle class people don't automatically benefit from the prosperity enjoyed by the upper class of American society. It isn't surprising that among those championing the rising tide theory are academics cloistered from the real world, and politicians who benefit from the financial favors of well-heeled people and large businesses.

The book's 13 chapters echo variations of chapter one, "The Best System the Moneyed Can Buy." An obvious example of the privilege money bestows is the way "justice" has a price tag the poor in this country can't afford. The idea that the justice system is fundamentally unjust is underscored by it being woven into a number of different chapters.

Anelauskas fills the role of the little boy in "The Emperor's New Clothes" by exposing many unpleasant truths about American society to the light of day. Unfortunately, the people most in need of reading the book will be the least likely to read it. Perhaps recognizing that critics will try and dismiss *Discovering America* as a rant by a disgruntled immigrant, Anelauskas supports his arguments with over 2,500 footnotes.

*Discovering America* presents a convincing case that in many important ways, the United States of 1999 hasn't advanced beyond Anatole France's observation of almost 100 years ago: "The law, in its majestic equality, forbids the rich as well as the poor to sleep under bridges, to beg in the streets, and to steal bread."

In looking at where current trends are leading, Anelauskas sees "globalization," a buzzword for the worldwide spread of American capitalism, as a threat to establish this country's economic, social, and political injustices in countries around the world. The World Trade Organization is one instrument of globalization, and grassroots opposition to its policies is developing in the United States and countries around the world.

Valdas Anelauskas has written a valuable addition to the growing number of books detailing how the lowly financial position of many tens of millions of Americans effectively disenfranchises them from having a voice in how they are viewed and treated by the political process.

Readers of *PLN* can order the book for \$13.45 (\$9.50 + \$3.95 s&h) from: Clarity Press, Inc. 3277 Roswell Rd. NE # 469 Atlanta, GA 30305.

### **Race to Incarcerate by Marc Mauer of the Sentencing Project, The New Press, 1999, 224 pages**

Review by Rick Card

If understanding the social, political, and financial issues associated with our nation's massive prison system was a solution in itself, Marc Mauer's book, *Race to Incarcerate*, would spell the end of the prison industrial complex.

*Race to Incarcerate* is a statistical history of the America's burgeoning prison population. Mauer discusses the politics leading to our nation's current "get tough" stance on crime, and talks about the effects it is having on society. Unfortunately, his message sometimes seems lost in a litany of statistics.

Mauer writes like an economist, explaining America's massive prison build-up in a relentless series of cold numbers. He seems oblivious to the fact that those numbers represent real people; men and women whose lives hang in the balance. There is no denying the facts spelled out in *Race to Incarcerate*, but those facts by themselves add little to the ongoing struggle of those forced to endure their meaning.

This book appears aimed at scholars and criminal justice experts—those who see the problems but never feel them. It reiterates the data found in almost every book of its kind, while offering nothing new and not a single proposal for changing our nation's destructive course. But if cold heartless facts are what you seek, this is a perfect book for your shelf.

Mauer writes, "We can try to comfort ourselves by calling prisons 'correctional institutions,' but it is clear that, after two centuries, we as a nation still cage the least fortunate among us to solve our problems." Unfortunately, until we begin discussing an acceptable alternative, the conditions are not likely to change.

*Race to Incarcerate* is available for \$22.95 from The New Press, 450 West 41 Street, New York, NY, 10036.

## Washington Prisoner May Not Challenge Underlying Infraction in Four Strike Disciplinary Violation

In the November 1998 issue of *PLN* we reported on *In re Gronquist*, 89 Wn.App. 596 P.2d 497 (WA Ct.App.Div.I 1997), where the Washington Court of Appeals granted Derek Gronquist's personal restraint petition alleging that he had been denied due process at a disciplinary hearing. The Department of Corrections (DOC) was granted review by the Washington Supreme Court and it reversed the appellate decision.

Gronquist, a Washington prisoner, was cited by prison officials at Clallam Bay Corrections Center for four general (minor) infractions. He was subsequently issued a serious infraction notice charging him with violation of Washington Administrative Code (WAC) 137-28-260(657) by having committed four minor infractions within a six-month period. Hearings with respect to such serious infractions are commonly referred to as "657" hearings.

At his 657 hearing Gronquist asserted the following defenses: (1) the unauthorized exchange of tobacco infraction was a minor infraction that resulted in an on-site adjustment and therefore could not be considered a minor infraction for purposes of a 657 serious infraction, (2) he was unconstitutionally denied the right to appear at his tobacco infraction hearing, and (3) he could not be found guilty of a 657 serious infraction because he was denied his due process right at the 657 hearing. He challenged only one of the four minor infractions. Washington state prohibits prisoners from loaning or giving to each other, or receiving tobacco products from each other. They may be infraacted for doing so. Gronquist was infraacted for receiving tobacco from another prisoner.

The basis of the due process claim of the tobacco minor infraction hearing was the fact that Gronquist was locked in his cell and was unable to attend because the electric callout button malfunctioned and he was not released from his cell to attend the hearing. It was his intention to have witnesses called to dispute the evidence against him. His administrative appeal of the minor infraction subsequently failed. At the 657 hearing Gronquist wanted to call the same

witnesses that he was denied the opportunity to call at the minor infraction hearing plus witnesses to attest to the malfunction of his call-out button but the hearing officer denied his request.

The Court of Appeals indicated that Gronquist had a due process right to challenge the underlying minor infractions at the 657 hearing to determine whether he had four minor infractions within the six-month period: "Because Gronquist's due process rights did not attach until the 657 hearing, it was only there that he could meaningfully challenge his general infraction by presenting witnesses and other evidence to support his defense."

### Washington Health and Safety Standards Apply to Prison Work Places

The Washington State Supreme Court has held that the Dept. of Corrections (DOC) must comply with electrical licensing and safety laws, but not competitive bidding and prevailing wage laws, when managing prisoner labor.

The National Electrical Contractor Association (NECA) and the International Brotherhood of Electrical Workers (IBEW) filed a complaint against Washington state's DOC and Department of Labor and Industries (DLI) alleging the DOC's use of prisoner labor to perform electrical work on prison facilities violates the state's electrical licensing statute, Washington Industrial Safety and Health Act (WISHA), prevailing wage and competitive bidding statutes.

As a preliminary matter, the DLI was dismissed as a defendant by the lower court, finding it was not a necessary party to the suit because the director and the DLI have discretion to determine when, who, and how to inspect use of electrical labor, and whether to issue citations.

The court dismissed with prejudice NECA/IBEW's claim that DOC violated the prevailing wage and competitive bidding laws. The court subsequently entered summary judgment in favor of the DOC, finding that NECA/IBEW did not have standing to bring claims on behalf of prisoner workers under WISHA, and that the DOC has broad statutory authority to utilize prisoner labor to perform electrical work notwithstanding statutory licensing and certification requirements.

The Supreme Court, citing numerous cases, concluded, "There is no basis to his contention he is entitled to relitigate underlying minor infractions in a serious infraction proceeding under WAC 137-28-260(657)."

Gronquist is not alone in finding the Supreme Court majority as making bad law in this case. A well written dissenting opinion demonstrated why the decision of the Court of Appeals should have been affirmed. Gronquist is pursuing the matter in federal court via habeas corpus. See: *In the Matter of the Personal Restraint Petition of Gronquist*, 138 Wn.2d 388, 978 P.2d 1083 (Wash. 1999). ■

On appeal, the supreme court reversed. The DOC had argued that the legislature gave the DOC broad discretion to use prisoner labor without regard to specific limiting laws regarding electrical licensing and certification requirements supersede the general statutes delegating authority to the DOC. The court specifically held that the DOC must comply with the electrical licensing requirements of RCW 19.28 before it can assign prisoner labor to do electrical work on prison facilities.

The ruling prohibits unlicensed Washington prisoners from "installing or maintaining electrical wires and equipment that are used for light, heat, or power and installing and maintaining remote control, signaling, power limited, or communication circuits or systems" related to prison facilities.

In regard to the safety and health issues, the DOC submitted that it only used Class III prisoners to do electrical work on prison facilities and adopted less stringent workplace safety and health standards for that class of workers. The court found, however, that the DOC has an internal policy that adopts WISHA standards, applying them to prisoner workers and DOC personnel pursuant to RCW 72.09.135. The court held that having adopted WISHA, the DOC must extend WISHA protection to all prisoner workers. See: *National Elec. Contractor Ass'n v Riveland*, 138 Wn.2d 9 (Wash. 1999). ■

## Four Florida Prison Guards Face Murder Charges

Nine guards from Florida State Prison's "X-Wing" were suspended while state law enforcement investigators probed their role in the July 17, 1999 beating death of X-Wing prisoner Frank Valdes [see page 1 of the October 1999 *PLN*]. On February 2, 2000, four of the suspended guards were indicted and arrested on second degree murder charges. They were immediately fired by the Florida Department of Corrections.

The indictment accuses the former guards of killing Valdes "by kicking and striking him with their feet and hands." The DOC letter firing the four admonished them for "fail[ing] to summon medical assistance" for Valdes.

An autopsy report showed that every one of Valdes' ribs were broken, there were boot marks imprinted on his body and his testicles were swollen. In reports filed by the guards immediately after Valdes died, they acknowledged that force was used to extract Valdes from his cell. But they contended that Valdes was fatally injured later, when he repeatedly flung himself off his bunk and cell bars.

Captain Timothy A. Thorton, Sgt. Jason P. Griffis, Sgt. Charles A. Brown, and Sgt. Robert W. Sauls were booked into the Bradford County Jail on Wednesday, Feb. 2nd. All four were on the five man "cell extraction team" that forcibly removed Valdes from his cell the day he was killed.

The next day more than 80 people - many wearing DOC t-shirts and Florida State Prison jackets - packed a Bradford County courtroom to show support for the guards who made their first court appearance via video from the jail. At the hearing a judge lowered their bail from \$100,000 to \$25,000. All four made bail and were released by the end of the day. Some community groups have started a collection drive for their legal defense fund.

One of the nine suspended guards, Sgt. Montrez Lucas, 30, was arrested in November and charged with aggravated battery, battery on an inmate and coercion to alter a report. Lucas is accused of beating Valdes the day before he died and for falsifying reports.

Lucas was fired by the DOC the same day the other four guards were indicted. His firing letter said that on June 15, 1999, a month before Valdes' death, Lucas told

a group of prison guard recruits that it was all right to falsify excessive force reports as long as the reports were "verified" by other guards.

Lucas summoned the extraction team to Valdes' cell the day he died, although it is unclear whether he participated in the cell extraction. It is also not known if Lucas cooperated with investigators. But his attorney, public defender John Kearns, said Lucas did not cooperate with prosecutors and didn't testify before the grand jury.

State Attorney Rod Smith wouldn't say whether he was able to "flip" any of the other guards who are a part of his investigation. But a source from the State Attorney's Office said the grand jury's work wasn't finished and hinted that more arrests might follow.

The others suspended were Sgt. Andrew W. Lewis and guards Dewey Beck, Raymond C. Hanson and Donald Stanford. Stanford, who was stationed on X-Wing the day Valdes died, told the *St. Petersburg Times* that he hadn't talked to law enforcement officials since he gave his initial statements, and he said he doubted that any of his colleagues were cooperating either. "If they're indicting these guys, they're wasting the taxpayers' money, because they'll never get convictions because nobody did anything wrong," Stanford told the *Times*.

His sentiments were echoed by Gloria Fletcher, a Police Benevolent Association lawyer representing Capt. Thorton. "The man didn't do anything wrong—he was doing his job," Fletcher told the *Times*. "It's a travesty of justice."

Capt. Thornton was the highest ranking guard of the four who were arrested and was in charge of the cell extraction team the day Valdes died. Among the four, Thornton also has the spottiest record. In 1996, Thornton was charged with aggravated battery after a fight at a local tavern. The charge was later dropped. Thornton pleaded guilty to a misdemeanor battery charge in 1986.

Another of the four, Sgt. Griffis, received a written reprimand in June 1996 for dumping a prisoner out of his wheelchair and kicking him in the back and side, according to personnel records. The reprimand said: "This is not the only instance of inmates sustaining injuries in your presence from unknown sources."

Lucas was given a 60 day suspension in 1995 for using "inappropriate force" to quell a prisoner disturbance.

Suspended guard Stanford said that prosecutors must be "blowing smoke" due to the intense publicity surrounding the case, and that prosecutors "won't have any chance of convicting [the four guards] in Bradford County or Union County, because everybody there either knows somebody or is related to somebody" working in the prison system.

Randall Berg, director of the Florida Justice Institute, said the "community support" demonstrated in the courtroom during the guards' bail hearings could influence a possible verdict if the trial isn't moved. "The entire prison industry is the leading industry of that area," Berg told the *Times*. "It's going to substantially influence the eventual outcome of the trial no matter how careful the judge and the state attorney might be."

But State's Attorney Smith said that he would seek an impartial jury in Starke, the small town where the Florida State Prison is located. Smith, who is running for the state Senate, publicly sympathized with the guards' families, saying it was a "terrible time" for them.

"I will stand with the families as long as they are standing on the right side of the line," Smith told the *Times*. ■

Sources: *St. Petersburg Times*, *Florida Times-Union*

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### U.S. Political Prisoner Info

The Anarchist Black Cross Federation is a group dedicated to providing political and material support to political prisoners and prisoners of war. They currently distribute one of the largest selections of books, tapes and videos by and about American political prisoners anywhere. The proceeds of the sales go directly to support the prisoners themselves.

Their selection includes booklets by political prisoners Sundiata Acoli, Ray Levasseur, George Jackson, Assatta Shakur, Bill Dunne, Pat Moloney, Mutulu Shakur, Jalil Muntaqim, Carmen Valentin, Marilyn Buck, Laura Whitehorn and many more. For a free catalog contact: Jacksonville ABC, 4204 Herschel, Suite 20, Jacksonville, FL 32210. (973) 389-9496.

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# Texas Prison Rocked by Guard Killing, Riot

A guard at the McConnell Unit prison in Beeville, Texas, was fatally stabbed a week before Christmas, 1999. Three days later 80 convicts escaped from their ad-seg cells and took control of the unit for three and a half hours before riot squads regained control.

Texas prison spokesman Larry Todd said the trouble began Friday December 17 at 3:45 p.m. when 37 year old prison guard Daniel Nagle was discovered laying in a pool of blood by a fellow guard. Nagle was apparently killed by one or more prisoners near the entrance of a crafts area.

A thin metal rod, "like a welding rod," about 6 to 9 inches long with a sharpened tip was found near Nagle's body, Todd said. A rag wrapped around one end of the weapon served as a handle.

The prison was immediately placed on lockdown and investigators began interviewing all prisoners who were in the area. The attack appears to have been planned, said Todd, but he declined to speculate on a motive.

PLN has learned, however, that the killing may have been planned by members of a prison gang and intended as retaliation for the state's policy of entombing suspected gang members in long term control unit segregation cells. Reliable sources tell PLN that younger, more militant members of the gang known as the Mexican Mafia recently wrested control from older gang members, most of whom are already consigned to long term ad-seg units. These younger, more radical gang members intended murdering a guard to send a message, sources tell PLN.

Texas Department of Criminal Justice spokesman Glen Castlebury told the *Houston Chronicle* that there is no evidence of a conspiracy to kill Nagle. The *Chronicle* reported that Nagle was thought to have been a target of prisoners. "Internal affairs is convinced that it's only one person who perpetrated the murder," Castlebury said.

Nagle, who worked at the 2,900 bed prison since June 1, 1996, was president of the Beeville chapter of the American Federation of State, County and Municipal Employees, which represents Texas prison guards.

He was an advocate of higher salaries and warned that the current low pay (among the lowest in the nation for prison guards) led to short staffing and dangerous working conditions.

Two days after Nagle was killed in a minimum security area of the prison and while the entire prison remained on lockdown, trouble erupted in the ad-seg unit. According to Castlebury, at around 3:45 a.m. Monday morning ad-seg prisoner William Steed Kelley somehow jimmied the lock of his cell door and got out. Steed then ambushed a guard with a 6 to 8 inch shank, Castlebury said, and forced him into the unit's control booth where another guard was. A struggle ensued, during which one guard was stabbed in the forearm.

After Kelly slashed the guard and started "punching all the buttons" to open the pod's 84 cell doors, the guards fled the control booth, Larry Todd told an Austin newspaper. A third guard fled to an adjacent exercise yard and scaled the fence, leaving the unit in the hands of prisoners.

According to Todd, one of the 84 cells was vacant and three of the prisoners stayed in their cells. The other 80 began causing extensive damage.

"They were breaking all the windows, smashing the equipment in the control room, pulling their mattresses out - trying to destroy everything they could," Todd told the *Austin American-Statesman*. "Then they tore the rails off their bunks and used them as battering rams."

A general alarm was sounded and steel riot doors were locked across a hallway to contain the uprising within that cellblock. More than 100 guards and riot specialists assembled to retake the cellblock. Guards and prisoners battled for more than two hours before prison authorities regained control at 7:15 a.m.

"The inmates used towels under the doors to keep out the gas, and a number were running around with wet towels across their faces for the same reason," Todd said. "It took some time, but control was re-established."

The prisoners who participated in the uprising were placed in vans and busses and dispersed to other ad-seg

units around the state. The cellblock was sealed as a crime scene as prison officials tallied the damage. Gary Johnson, director of the prisons division of the TDCJ said it would be a month before the unit could be repaired and restored to service.

Castlebury said the ad-seg uprising was not related to the killing of Nagle. "We would see no relationship between the two incidents," Castlebury told the *Houston Chronicle*.

Nagle was the first Texas prison guard killed since 1982 when Minnie Houston was stabbed to death by a prisoner at the Ellis Unit. Nagle is survived by his wife, a former McConnel Unit guard, and three young children, ages 3 months, 3 years and five years.

Castlebury said prison officials have a suspect in the killing, but will not release any information until after more evidence is collected and presented to a Bee County grand jury.

Todd said officials plan to seek charges of attempted capital murder and inciting a riot against Kelley. He is already serving a 99 year term for attempted murder and aggravated sexual assault.

Prison guards and family members complained to state officials that the stabbing and riot stem from a staffing shortage of more than 1,000 guards statewide. "The prisons are a powder keg waiting to explode," Lidia Torres, who said her brother works at the McConnel Unit, told the *Austin American-Statesman*. "How many more people have to be killed before something is done?"

In a related story, on January 16, 2000, Ernest Coleman, 41, a guard at the Byrd unit in Huntsville, was stabbed in the abdomen with a pencil. Surgery was performed to remove the pencil and determine if any serious injury had resulted. Prison officials claim prisoner Mark Encinas, 21, stabbed Coleman in the prison dining hall after finishing his breakfast. ■

Sources: *Houston Chronicle*, *Austin American-Statesman*, *Tyler Morning Telegraph*, *Dallas Morning News*, *Associated Press*

# Two Die During Latest Angola Escape Attempt

by Dan Pens

A guard and a prisoner were killed December 28, 1999 at Louisiana's maximum security penitentiary at Angola during a bungled escape attempt that ended after a two hour hostage standoff.

The guard, Captain David Knapps, 49, was beaten to death with a hammer when he refused to give up his keys to six prisoners, all serving life without parole, said Warden Burl Cain.

The warden said the incident began at about 8:30 p.m. in Camp D, an 850 bed unit of cellblocks and dormitories. A sergeant, Reddia Walker, noticed Capt. Knapps struggling with several prisoners near the camp's educational building. Walker sounded her alarm and ran to help, but she and another guard, Lt. Douglas Chaney, were taken hostage along with Captain Knapps and held hostage at knife point in a classroom.

The warden arrived, backed by the prison's tactical team, and began negotiating with the prisoners. Cain told the *New York Times* that one of the prisoners, 26 year old Joel Durham, hollered out: "I've got nothing to lose. I came here as a young man. I'm going to die in prison."

"Oh, it'll be all right," Cain replied, "We'll work it out."

"You haven't looked in the bathroom," Durham replied, according to Cain, apparently referring to the corpse of Capt. Knapps.

After a two hour standoff, and "after discovering Captain Knapps' body" [so the *Times* reported, but did not explain how the body was discovered, or by whom], the tactical team tossed a percussion grenade into the classroom and stormed the hostage takers.

Durham lunged at Sgt. Walker with a knife, Cain said, and "one of the officers shot him twice in the chest and once between the eyes," killing him instantly. Cain said another prisoner, David Mathis, 23, was shot "smack dab in the bottom of his lip," but survived.

Two days after the incident, a state judge signed arrest warrants for the surviving five prisoners, accusing each of

first degree murder and aggravated kidnapping.

Captain Knapps, like many of Angola's employees, was part of a large family of prison guards. His father, five of his siblings, two of his children and his fiancée are all current or former Angola staffers, prison officials said.

He is the first guard to die at Angola since 1972 when Brent Miller was stabbed in a dormitory. That murder was pinned on Albert Woodfox and Herman Wallace who were then leaders of the Angola Branch of the Black Panthers. Their convictions were based solely on the testimony of a paid informant; no physical evidence linked them to the killing. Wallace and Woodfox are still at Angola, having served nearly 30 years in solitary confinement.

Angola was the scene of an increasing number of troubling incidents in 1999. In January, four lifers escaped after a prison employee helped smuggle a can containing guns inside the walls. Three were captured, one shot himself rather than surrender.

In May, five CCR (Closed Cell Restricted) prisoners (including Woodfox and Wallace) initiated a hunger strike that was eventually joined by more than 60 CCR prisoners. On the third day of the strike the prisoners were told the warden would meet with them and they decided to end the hunger strike.

Guards told four of the prisoners to leave their cells to meet with the warden. But instead, the four were gassed, beaten, and charged with "inciting a hunger strike" and sentenced to one to three years in "Camp J", the punishment section of Angola where conditions are extremely harsh.

In November, four death row prisoners escaped by sawing through cell bars with smuggled hacksaw blades but were caught on the prison grounds as they headed toward the Mississippi River with a makeshift raft.

Ten days before the bungled escape in December, the *Baton Rouge Sunday Advocate* published a long article outlining how security lapses and collusion by prison guards had led to an alarming in-

crease in violent incidents at the 18,000 acre prison plantation. Citing internal prison documents, the newspaper reported another recent incident where a prisoner with a 6 inch knife walked out of the main prison building and into another part of the complex, where he nearly stabbed a guard before being overpowered. The lapses in security have not escaped the attention of local law enforcement.

"It's been going on for quite some time," said Sheriff W.M. Daniel of East Feliciana parish (county), where Angola is located. "It's been kind of deteriorating over a period of time where the inmates are losing respect for the security personnel."

Of note is that none of the above cited incidents have been reported by the award winning prison magazine, *The Angolite*. Under previous Angola wardens, renowned *Angolite* editor Wilbert Rideau was given a free hand to publish hard hitting investigative reports of abuse and corruption at Angola. As a result, Rideau and *The Angolite* received international praise and the magazine was credited by many as being instrumental in bringing about positive changes at Angola by exposing the worst corruption and brutality.

Since Cain arrived in 1993, however, *The Angolite* has printed fewer "hard hitting" articles and, in fact, none of the above described incidents were reported on the pages of a once first rate prison news magazine. Not that Rideau and staff are to blame. Cain likes to control the flow of information out of Angola. He handles the mainstream media by dishing up a heapin' helpin' of down home corn pone homilies and southern fried soundbites. And he handles the *Angolite* by clamping down the repressive muzzle of censorship. *The Angolite* still publishes first rate prison news articles... just as long as they don't cover any of the "bad news" from the plantation. ■

Sources: *New York Times*, *Associated Press*, *Revolutionary Worker*, *Baton Rouge Sunday Advocate*

## Prison Must Provide Medication Supply to Released Prisoners

by Matthew T. Clarke

Holobird

The Ninth Circuit has held that prison officials must provide a supply of medications to prisoners requiring medication when they are released from prison.

Timothy Wakefield, a California state prisoner who requires psychotropic medication to control his Organic Delusional Disorder (ODD) and attendant violent outbursts, filed a civil rights action under 42 U.S.C. § 1983 alleging that a prison guard violated his due process rights and subjected him to cruel and unusual punishment when he refused to give Wakefield a prescribed two-week supply of medication upon his release from prison.

Wakefield had been incarcerated at San Quentin. During his incarceration, he was prescribed and took Navane, a psychotropic medication, to control his ODD. Shortly before his release, Wakefield met with the prison's staff psychiatrist. The psychiatrist prescribed Wakefield a two week supply of Navane, to be issued to him upon release.

When Wakefield was released, he informed the guard handling the release procedure about the medication. The guard told Wakefield that "there wasn't any medication available" and refused to even call the prison medical staff to check on Wakefield's prescription. The guard's only explanation was that he was running late paroling.

The district dismissed Wakefield's John Doe prison guard defendant, stating only that John Doe defendants were not favored in the Ninth Circuit. Wakefield appealed.

The Ninth Circuit held that Wakefield's John Doe designation was acceptable because he had no way to discover the guard's true name without conducting discovery. The Ninth Circuit also held that, although under *DeShaney v. Winnebago City Dep't of Soc. Svcs.*, 489 U.S. 189 (1989), "the Due Process Clause does not place affirmative duties on the state," the Supreme Court carved out an exception to this general rule when it decided, under *Estelle v. Gamble*, 429 U.S. 97 (1980), that prisoners had a right to medical treatment. This right flows from

the fact that the state rendered its prisoners unable to provide the care for themselves. "It is a matter of common sense, however, that a prisoner's ability to secure medication 'on his own behalf' is not necessarily restored the instant he walks through the prison gates and into the civilian world. Although many patients must take their medication one or more times a day, it may take a number of days, or possibly even weeks, for a recently released prisoner to find a doctor, schedule an examination, and have a prescription filled. Accordingly, the period of time during which prisoners are unable to secure medication 'on their own behalf' may extend beyond the period of actual incarceration. Under the reasoning of *Estelle* and *DeShaney*, the state's responsibility to provide a temporary supply of medication to prisoners in such cases extends beyond that period as well."

The Ninth Circuit held "that the state must provide an outgoing prisoner who is receiving and continues to require medication with a supply sufficient to ensure that he has that medication available during the period of time reasonably necessary to permit him to consult a doctor and obtain a new supply. A state's failure to provide medication sufficient to cover this transitional period amounts to an abdication of its responsibility to provide medical care to those, who by reason of incarceration, are unable to provide for their own medical needs."

The Ninth Circuit concluded "that Wakefield's allegation that Doe exhibited deliberate indifference to his serious medical needs by failing to provide him with the medicine prescribed by (the psychiatrist), or to make any effort to obtain it for him, adequately states a § 1983 claim for the violation of his Eighth Amendment and Fourteenth Amendment rights." The order dismissing John Doe was reversed and the case returned to the district court for further proceedings. See: *Wakefield v. Thompson*, 177 F.3d 1160 (9th Cir. 1999). ■

# Virginia Court Requires Pro Se Prisoner Plaintiff to Appear Via Video Conference

by Matthew T. Clarke

A federal district court in Virginia has held that a pro se prisoner must present his civil rights case to the jury via video conferencing.

Michael S. Edwards, a Virginia state prisoner, filed a civil rights suit under 42 U.S.C. § 1983, against Virginia guards, seeking monetary damages. He requested a jury trial. Virginia transferred Edwards to New Mexico "due to his extensive enemy situation" throughout the prison system "and the lack of a viable housing assignment for him in Virginia."

The court ordered the parties to brief whether Edwards should be allowed to attend the trial in light of *Muhammad v. Baltimore City Jail*, 849 F.2d 107 (4th Cir. 1988), which held that plaintiff prisoners in a civil rights action had no absolute right to be present at a jury trial. The defendants took the position that Edwards should have to pay the \$8,652.00 estimated costs of transportation and recommended the court consider video conferencing as an alternative. Edwards countered that he was indigent and asked that state be required to produce him at their expense. Edwards did not respond to the video conference suggestion.

The court noted that courts throughout the country are using video conferencing. Federal Rule of Civil Procedure 43(a) allows the use of video conferencing to present witness testimony, and it had been used to present child witness testimony in criminal cases. A circuit has held that a criminal arraignment may not be held via video conferencing because the Federal Rules of Criminal Procedure require a defendant's presence. *Valenzuela-Gonzales v. United States Dist. Court*, 915 F.2d 1276 (9th Cir. 1990). However, one district court has held that video conferencing allows a defendant to be "present." *United States v. Edmondson*, 10 F.Supp.2d 651 (E.D.Tex. 1998).

The court also noted that the Prison Litigation Reform Act contained a provision that required the use of video conferencing for pretrial matters in prisoner litigation. 42 U.S.C. § 1997e(f)(1). Although there was no indication of leg-

islative intent in the Congressional Record, the court speculated that "there is no reason to believe that Congress intended to prohibit the use of video conferencing to conduct the trial of a prisoner's suit. The clear intent of this legislation was to reduce the cost and administrative burdens associated with prisoner litigation."

The court then held that although "it is not the same as actual presence, and it is to be expected that the ability to observe demeanor, central to the fact-finding process, may be lessened in a particular case by video conferencing" and "this may be particularly detrimental where a party to a case is participating by video conferencing, since personal impression may be a crucial factor in persuasion," the issue in this case was

relatively straightforward and could be effectively presented via video conferencing. The court also found that "the costs and security concerns" associated with bringing Edwards from New Mexico to Virginia were too great and ordered the trial to proceed via video conferencing.

Readers should note that *PLN* recently reported a decision that a prisoner plaintiff had a right to attend his trial even though he had pro bono counsel. *Hawks v. Timms*, 35 F.Supp.2d 464 (D.MD 1999). Also, the *Edwards* court apparently did not consider the possibility of leveling the playing field by requiring the defendants and their counsel to present their case via video conferencing as well. See: *Edwards v. Logan*, 38 F.Supp.2d 463 (W.D.Va. 1999). ■

## New York Federal District Court Rules Nassau County Strip Search Policy Unconstitutional

Ray E. Shain was arrested in Nassau County, New York, after police received a domestic disturbance call, and subsequently remanded by a Nassau County District Court Judge to the custody of the Nassau County Sheriff at the NCCC. Upon arrival, in accordance with the uncontested written policy of NCCC, Shain was subjected to a strip and visual body cavity search. He was not touched, but he was told to disrobe and the areas under his arms, behind his ears, in his mouth, between his buttocks, and under his genitals were inspected. Shain filed suit under 42 U.S.C. § 1983, alleging, among other issues, that the blanket strip search policy violated his Fourth Amendment right to be free from unreasonable search and seizure.

In granting Shain summary judgment limited to the strip search issue, the court noted that the Second Circuit had held such blanket strip search policies to be unconstitutional as far back as 1986. See: *Weber v. Dell*, 804 F.2d 796 (2d Cir. 1986), cert. denied, 483 U.S. 1020 (1987). This precluded the defendants from raising

qualified immunity as a defense, even though Nassau County claimed it had unique security concerns peculiar to NCCC. Because of *Weber* and the court's reiteration of that precedent in *Walsh v. Franco*, 849 F.2d 66 (2d Cir. 1988), the law establishing the unconstitutionality of such a blanket strip search policy was well established and the court was "precluded from considering the institutional concerns of the NCCC."

The court held that, because the policy of strip searching all misdemeanor and minor offense arrestees remanded to NCCC, without requiring any suspicion that the remanded individual is concealing weapons or other contraband violates the Fourth Amendment under clearly established law, the county and the county sheriff were not entitled to qualified immunity. Shain was entitled to summary judgment.

*PLN* has recently reported other problems with the NCCC, including the fatal beating of detainees ("Detainee Beaten to Death at Nassau County Jail," (*PLN* July, 1999)). See: *Shain v. Ellison*, 53 F.Supp.2d 564 (E.D.N.Y. 1999). ■

# Flight to Texas Execution 'Not Life Threatening'

Fidelis

Texas prisoner David Martin Long had a date with the nation's busiest executioner (who had already dispatched 31 souls in 1999) on Wednesday, December 8, 1999. But Long decided to go out on his own terms: prison guards found him unconscious from a drug overdose Monday morning. Long had apparently hoarded his anti-psychotic drugs and took them in a nearly successful suicide attempt.

Texas prison officials promptly rushed Long to a Galveston hospital, where he was placed on life support in the intensive care unit. Dr. Alexander Duarte, the physician in charge of the case, told the *New York Times* that Long's condition improved from critical to serious Tuesday and he was taken off the ventilator. Dr. Duarte said Long still required oxygen and continual medical care. Under normal circumstances, he said, he would probably keep Mr. Long in the intensive care unit for another day or two.

But the circumstances were far from normal. On Wednesday the U.S. Supreme Court rejected Mr. Long's final appeal. State prison officials approached Dr. Duarte and asked him to sign an affidavit stating that Mr. Long could be safely transported to Huntsville, a request that he refused. But Dr. Duarte did sign another affidavit stating that Mr. Long's health had improved, that he had suffered no seizures and was responding to questioning -- but that transporting him could be risky without proper medical care.

Under Texas law, when a prisoner has exhausted all appeals and, as in this case, the Board of Pardons and Parole has rejected clemency, the governor has two options: reject clemency or grant a 30 day stay. With Texas' "Compassionate Conservative" presidential hopeful Gov. G.W. Bush Jr. stumping in New Hampshire, the decision on Mr. Long's fate technically fell to Lt. Gov. Rick Perry, who declined to delay the execution. But Gov. Bush's spokeswoman said the governor agreed that the execution should proceed.

A prison official identified only as "Mr. Sullivan" by the *New York Times* said, "The Texas Department of Criminal Justice determined that transporting [Mr.

Long] to Huntsville is not life threatening...."

And so a state airplane, staffed by medical personnel to ensure that the condemned man arrived in good health, was dispatched to Galveston for the 25 minute flight back to the state's death chamber in Huntsville. And David Martin Long, 46, convicted triple hatchet killer, was duly killed—on time but probably not under budget.

"It seems like a pretty sick process when you jerk a guy out of intensive care on a ventilator," Long's attorney John Blume told the *Times*. "What's the huge rush?" ■

Source: *New York Times*

## Eleven Guards Injured in CA Ruckus

Eleven guards were treated for injuries resulting from a November 22, 1999 incident at the High Desert State Prison in Susanville, California prison authorities said.

One guard had two teeth knocked out, *The Sacramento Bee* reported, during an attack by about 60 prisoners who refused to be strip searched.

"They were trying to kill people. It was full-blown riot," said a spokesperson for the prison guards union (which has been known to exaggerate the seriousness of incidents to bolster the false claim that their members walk "the toughest beat in the state.")

According to official prison sources, a strip search was ordered after a fight between two prisoners turned up a pair of weapons. Ninety prisoners were searched and locked up, but about 60 others refused and instead attacked guards.

About 10 prisoners were treated for injuries after the uprising was stopped with pepper spray, batons and "physical force," said a prison spokesperson. ■

Source: *Associated Press*

Kent Russell

# HIV+ Prisoners Not Qualified For Rehabilitation Act Benefits

by James Quigley

The U.S. court of appeals for the Eleventh Circuit, sitting en banc, held that because prisoners infected with Human Immunodeficiency Virus (HIV+) pose a "significant risk" of transmission to uninfected prisoners, they are not "otherwise qualified," as required under § 504 of the Rehabilitation Act (RA) for benefits under that RA. As a result, the Alabama Department of Corrections (ADOC) could not be compelled under the RA to provide integrated program participation with uninfected prisoners.

This case was commenced in 1987, as *Harris v. Thigpen*, in response to the application of Ala. Code § 22-11A-17 (1975) to ADOC prisoners. This law mandates the testing of "[a]ll persons sentenced to confinement or imprisonment" in Alabama, for "sexually transmitted diseases." Section 22-11A-18 provides for the quarantine or isolation of all persons having notifiable diseases.

As the AIDS epidemic began to manifest itself within the prison system, ADOC officials implemented a policy of isolating all HIV+ prisoners at one of two state prisons. Males were segregated at the Limestone Correctional Facility in Capshaw, while females were confined to the Julia Tutwiler Prison for Women at Wetumpka. The inexorable result of this policy was the unavailability of many ADOC programs and activities to HIV+ prisoners.

Initially, the prisoners sued under 42 U.S.C. § 1983 and the RA, challenging *inter alia*, the practice of denying some programs to HIV+ prisoners, and providing access to other programs separately. The prisoners asserted that § 22-11A-17, *et seq.*, were unconstitutional under the First, Fourth, Eighth and Fourteenth Amendments, and violative of § 504 of the RA (29 U.S.C. § 794).

After a bench trial, the district court concluded that no constitutional rights were violated. *Harris v. Thigpen*, 727 F.Supp. 1564 (MD AL 1990). In addition, the court concluded that the prisoners were not "otherwise qualified," as required under § 504, for RA benefits because their participation in integrated programs and activities would pose a "significant risk" of HIV transmission.

In the first appeal, the Eleventh Circuit affirmed judgment against the prisoners on the constitutional claims. *Harris v. Thigpen*, 941 F.2d 1495 (1991)[*PLN*, Jan. '92 at 2]. However, the appeals court remanded the case to the district court for a program-by-program analysis to determine whether HIV+ prisoners were "otherwise qualified" to participate in a given program. This process necessarily involved a particularized evaluation of HIV transmission in each program.

After remand, the second trial focused on measuring the significance of the risk of HIV transmission in a host of ADOC programs. The prisoners argued that the odds of HIV transmission in prison programs was remote at best. The government countered that HIV transmission is at least theoretically possible, and offered numerous incident reports describing hidden hypodermic needles, homosexual acts, and bloody fights.

Of particular note, the government cited a 1991 outbreak of syphilis in the HIV+ unit at Limestone in which 86 prisoners became infected, all traceable to a single prisoner! There was also evidence of a "sensational incident of high-risk behavior committed by two Limestone kitchen workers who engaged in homosexual sex in the kitchen bakery beside a mixing bowl of peanut butter and jelly."

In general, the trial court again accepted the government's spin on things. It found that prison life is inherently unpredictable, and that high-risk behavior (sex, intravenous drug use, and blood-to-blood contact) are perpetual possibilities whenever guards are not watching. Since HIV is transmitted by such behavior, the court reasoned that HIV transmission was more than a theoretical possibility. Significantly, the prisoners neglected to challenge these findings as being "clearly erroneous."

After the second trial, the court concluded that the risk of HIV transmission was significant in all programs, simply because HIV infection inevitably progresses to AIDS, and AIDS always leads to death, usually after prolonged suffering. In a 476 page opinion, the district court again held that HIV+ prisoners

are not "otherwise qualified" under the RA, and program integration would be too risky.

During the course of the litigation, Harris succumbed to the AIDS virus, and the relevant officials required substitution, as well. In *Onishea v. Hopper*, 126 F.3d 1323 (1997) (*PLN*, June '98 at 20), a panel of the Eleventh Circuit agreed with the prisoners on most of the remaining issues, and once again reversed the trial court. However, on rehearing en banc, the full court vacated the panel opinion, 133 F.3d 1377 (1998), and ordered new briefings on the issues.

The first issue addressed by the court was the meaning of "significant risk." In this regard, the court acknowledged that under the RA, an "individual with a disability" does not include "an individual who has a currently contagious disease or infection and who, ... would constitute a direct threat to the health or safety of other individuals." 29 U.S.C. § 705(20)(D). Obviously, the interpretation of this provision was the linchpin of the case.

In analyzing this point, the court recognized *School Board v. Arline*, 480 U.S. 273, 287 n.16 (1987), for the proposition that "[a] person who poses a significant risk of communicating an infectious disease to others in the workplace will not be otherwise qualified for his or her job if reasonable accommodation will not eliminate that risk." Because of the fatal nature of HIV, the court reasoned that even low transmission risks are "significant," and since this finding was "unchallenged" by the prisoners, the focus shifted to the availability of "reasonable accommodations."

On this point, the court considered whether the district court improperly employed the four-factor *Turner v. Safley*, 482 U.S. 78 (1987), test to determine if legitimate penological concerns affected its "reasonable accommodation" analysis. Although conceding that *Turner* does not apply to statutory rights, the court found that consideration of various penological concerns, such as security and costs, was nonetheless acceptable.

In response, the prisoners argued that even if *Turner*-like factors were prop-

erly considered, the district court's findings that program integration would risk violence, and that the ADOC's policy of segregation was less than an exaggerated response, were clearly erroneous. However, the prisoners' reasoning was rejected on each point.

Although the court found the evidence offered by both sides was anecdotal and equivocal, it concluded that the district court's resolutions were not clearly erroneous. The court also noted that "*Turner* compels a conclusion that a response is exaggerated only when the inmate produces evidence of 'easy alternatives' that come at a de minimus cost of valid penological interests." In sum, the court concluded that the district court could import *Turner* reasoning into its RA analysis to determine whether the prisoners were otherwise qualified to participate in ADOC programs, and that the court's analysis was "substantially correct."

Lastly, the court noted that the *Harris* panel directed the district court to consider whether "reasonable accommodations" would permit the prisoners to

participate in any of the programs at issue. In doing so, the district court determined that the proposed accommodations, which consisted principally of hiring additional guards to prevent high-risk behavior, would entail an "undue burden" on the ADOC. The prisoners challenged these conclusions on four grounds.

First, the prisoners argued that a classification process could separate high and low risk prisoners, allowing low risk prisoners to participate in integrated programs. On the premise that "prisoners are inherently 'unpredictable,'" the court rejected this accommodation "because it does not reduce the risk of HIV transmission."

Second, the prisoners proposal of hiring additional guards to survey the programs and prevent high risk behavior was rejected primarily because of its \$1.7M price tag. According to the court, reasonable accommodations are only mandatory up to the point that they impose "undue hardships" on the federal funds recipient. The court agreed with the lower tribunal that the appropriate

level of staffing would place undue financial and administrative burdens on the ADOC.

In their third ground, the prisoners argued that the district court improperly considered only the aggregate burden of program integration, rather than looking at each program individually. This argument was rejected by the court on theory that the prisoners failed to specifically identify a range of "preferred ... programs." The court noted that it is incumbent on plaintiffs to identify their particularized claims for relief.

The prisoners' fourth challenge was to the district court's determination "that 'separate but equal' programming" was not a proper accommodation of their disability. However, the court declined to review this issue because it was newly raised for the first time on appeal.

In conclusion, the full court affirmed the judgment of the district court, with only three judges offering two dissenting opinions. Now Florida and Georgia will be free to isolate their HIV+ prisoners. *Onishea v. Hopper*, 171 F.3d 1289 (11th Cir. 1999)(en banc). ■

## Tele-net

# Turkish Political Prisoners Massacred

On September 26, 1999, eleven political prisoners in a Turkish prison were massacred by police. The victims were imprisoned members of the People's Revolutionary Liberation Front Party (DHKP-C) and the Communist Party of Turkey-Marxist-Leninist (TKP-ML). Both organizations are currently waging people's wars to overthrow the Turkish government.

On September 26, 1999, police stormed the Uluncanlar prison in downtown Ankara using gunfire and teargas to retake the prison. Police used extreme brutality and took advantage of a tense situation created by prison administrators. Since September 2, 1999, water had been cut off to the prisoners' cells, visits had been prohibited and food packages from the outside had been limited. In Turkey, like most countries, the government does not feed the prisoners, prisoners must rely on friends or family outside to supply them with food. The government later claimed the massacre was justified because the prisoners would not allow guards to inspect a dormitory where, they claimed, a tunnel was being dug. After the massacre no tunnel was found.

In response to the latest massacre, bringing to 27 the number of Turkish political prisoners killed since 1995, prisoners from Turkish revolutionary organizations across the country rioted and took more than 100 guards hostage. In Istanbul large street protests supporting the prisoners took place, with police arresting more than 300 people. A wave of sabotage and bombings against government facilities across Turkey also took place in support of the prisoners' struggle.

The Turkish government is determined to break solidarity and unity among its political prisoners. Until now, Turkish political prisoners of diverse groups live together in open cells and organize themselves into communes. The Turkish government is seeking to isolate prisoners accused or convicted of political offenses by locking them into cells with no more than three people and isolating them from all other contact. To carry out this isolation plan, as well as to relieve overcrowding, the Turkish government plans to build an additional 20,000 prison beds. The increased isolation is expected to allow the easier torture, mistreatment and breaking of political prisoners' will

to resist. Turkey has some 70,000 people in its prisons, of whom at least 10,000 are political prisoners belonging to assorted leftist political groups struggling to overthrow the regime. A smaller number of political prisoners belong to right wing Muslim fundamentalist groups.

A statement sent to *PLN* by the Turkish political prisoners at the Uluncanlar prison, denounced the attack and notes that hundreds of Turkish political prisoners have been murdered over the years by Turkish police and prison officials, mainly through medical neglect but also through torture, shootings and beatings. The prisoners stated that after the September 26 assault the bodies of some of the dead prisoners were decapitated and mutilated before being released to their families.

Halkin Hakuk Burosu, an attorney with the People's Law Office in Istanbul, who represents some of the political prisoners, described the bodies of the prisoners that were released to the families: "According to the physicians, some prisoners had been killed by bullets, several others were tortured to death, or severely wounded. The doctors also stated that many prisoners had knife wounds in the neck and arms." At least thirty other prisoners were hospitalized with serious injuries after the attack.

In their letter to *PLN*, the prisoners state that the massacre was wholly unjustified and the Turkish government was spreading lies to attempt to cover up the murders. Their statement ends: "We appeal to all revolutionary organizations, to democrats and progressives and to all people of conscience to protest against fascism in Turkey and to support the revolutionary prisoners. Fascism continues sweeping away all rights and creates tensions and actions within the prisons. A new massacre could take place at any moment."

Two days after the massacre, Turkish prime minister Bulent Ecevit met with U.S. President Bill Clinton to defend Turkey's human rights record. The United States is the largest supplier of weaponry to the Turkish regime and actively supports the government's counter-insurgency plans. ■

Sources: *Financial Times of London*, *Lalkar*, *Resistencia*, Reader Mail.

# NY Prisoner Worker Awarded \$90,000 in Accident

In 1995 William Terry was a prisoner at the Lyon Mountain Correctional Facility where he worked as a hay shredding machine operator on the prison dairy farm. While operating the shredding machine without safety shields, Terry's glove became caught in the machine and severed part of his right middle finger and severely injured his index finger. An attempt to surgically reattach the severed finger was unsuccessful.

Terry filed suit in the New York state court of claims which entered a ruling in his favor. In July 1999 the court found that the prison had violated its own policies requiring that machine safety guards be properly maintained. The state was also negligent in failing to properly train Terry in the safe operation of the shredding machine. The court found no negligence on Terry's part.

The court awarded Terry \$65,000 for past pain and suffering and \$25,000 for future pain and suffering. See: *Terry v. State of New York*, Claim Number 95211, court of claims, Plattsburgh, New York. Judge John Bell. ■

Source: *New York Jury Verdict Reporter*

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## Notes from the Unrepententiary

### Thinking About Dying and Living at the End of the 2nd Western World Millennium by Marilyn Buck

Because I'm a Federal prisoner in California, I hear more about what goes on in California state prisons than in other states. Fortunately there exists a progressive, growing prisoner support movement with numerous groups. There needs to be, given the proliferation of the California prison state, run by the California guards union with its maximum control units, brutality, gladiator fights and carnival shooting sprees.

Prisoner support groups have organized hard, protested, filed law suits. Some victories have been won. But in spite of their unceasing labors and dedication, prisoners continue to die at the hands of the state inside these prison walls. Until recently, because of prison and AIDS activists, there was a possibility of a compassionate release when a prisoner was dying of AIDS or cancer. The current governor, Gray Davis, has thrown that out. The prisoner must die in custody.

Women prisoners were recently slapped in the face. The court appointed assessor in the Shumate suit (a class action suit filed by Charisse Shumate and other women prisoners at Chowchilla against medical malpractice and lack of treatment) is prepared to announce that the DOC has complied with the court's order to provide adequate medical care. Such an opinion in a prison where the head doctor told Ted Koppel on *Nightline* that the reason for unneeded pelvic exams instead of other medical treatment was because the women are sexually-deprived and like them! (This Dr. was moved to a desk job for revealing the practice.) Better sexually abused than sexually deprived?

Women are dying in Chowchilla and Valley State prisons from lack of adequate medical attention; they aren't dying from lack of forced sexual attentions. A one or two year sentence has become a death sentence for several women in this past year.

Women everywhere are struggling to stay alive and to be treated like we are human beings. U.S. women prisoners

have a lot in common with women in Taliban dominated Afghanistan. We are among the "missing"—missing from free, productive labor, from the schools, from our home. Our ideas, skills, wisdom and common sense are missing from society. We are locked away, gagged and bound by our absence; we are censored. We are not present. Afghani women are imprisoned behind the shuttered walls of their family homes. They do not receive adequate medical treatment either because the women doctors are also locked away and male doctors may not even see the face of the woman needing care. We are all pushed toward death by deliberate detention and neglect.

Prisoners—women and men—would do well to remember and support the missing women, and all the missing who are locked away and hidden. We would do well to find ways to remove the gags, like the courageous sister Shumate and her sisters in California prisons have done at great personal risk. Few women may receive an officially imposed death sentence, but we are dying behind these prison walls. There are even prisoners who support the death penalty (though not for themselves I'm sure). There are others who act as executioners for the guards and/or prisoner bullies. Can we stand by silent and accept dying as our "punishment" for being less human?

We can be motivated, productive women and men even behind these walls artists, craftspersons, writers, engaged parents and students. Our lives have value no matter what any cop, politician or right wing fundamentalist shill may scream.

Wouldn't it be novel, interesting and maybe even exciting to stop killing ourselves and instead to look for ways to save our lives? We can support those who are fighting to stay alive, like the women prisoners with HIV, HCV and cancer who have sued to be treated like human beings; or like Mumia Abu Jamal who is fighting for his life and those of other prisoners on Death Row.

Our silence is suicidal. ■

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## \$4.1 Million Award In Suit Over Sexual Assault of Prisoners By Official

by Matthew T. Clarke

A federal district court in Texas has awarded two female prisoners who were the victims of sexual assault by a prison official \$4.1 million in a jury trial.

Plaintiffs, "A" and "B" were female state prisoners at the Murray Unit of the Texas Department of Criminal Justice (TDCJ). In November, 1996, "A" and "B" were sexually assaulted by David Taylor, a parole officer, in an office maintained by the Board of Pardons and Paroles inside the prison during a pre-release interview. After he sexually assaulted "A," Taylor told her he was a Desert Storm participant who had been trained as a sniper and explosives expert and threatened her family should she report the incident. Two days later, "A" reported the sexual assault to Internal Affairs Investigator William Musser. Taylor sexually assaulted "B" one week later.

Plaintiffs filed suit under 42 U.S.C. § 1983 against Musser, TDCJ, the Board of Pardons and Paroles (BPP), and the prison's warden, assistant warden and captain. The suit alleged that the pre-release interviews should have been co-monitored by a female to prevent such incidents and that Musser failed to protect "B" after "A" reported the first sexual assault.

Musser claimed he planned to audio tape the next pre-release interview, but "B" was sexually assaulted before he acted. Musser also relied on existing prison policy which did not require the presence of a second person during a pre-release interview and claimed that the initial report by "A" only complained of breast touching, not fellatio and sexual intercourse which was later reported. He maintained his response was appropriate for an unsubstantiated allegation by one female prisoner who did not immediately report the incident. Taylor admitted sexual contact, but claimed it was consensual and initiated by the plaintiffs.

TDCJ and BPP were dismissed on 11th Amendment grounds. During trial, Musser settled with the plaintiffs for \$95,000. A directed verdict was granted to the prison warden, assistant warden and captain, leaving only Taylor as a de-

fendant. After a three day trial in September 1999, the jury voted 8-0 in the plaintiffs' favor, awarded \$700,000 in actual damages and \$1,500,000 in punitive damages to "A" and \$400,000 in actual damages and \$1,500,000 in punitive damages to "B".

Taylor resigned from BPP in November 1996. He was charged with criminal sexual assault and found not guilty. He recently filed for bankruptcy. Plaintiff's attorney Steve Gibbins commended the trial judge, stating that "Judge Sparks is a great jurist and gave a fair trial for all." See: "*A" and "B" v. Ament*, Cause No. A98-CA-503, USDC W.D.Tex.-Austin Div. ■

Source: *The Blue Sheet of Central Texas*

### No Immunity for Media Defendants in Ridealong Suit

In the October, 1999, issue of *PLN* — we reported *Hanlon v. Berger*, 119 S.Ct. 1706 (1999) where the court held that it violates the Fourth Amendment to the U.S. constitution for police to bring media reporters and photographers with them when they enter the homes of people being arrested or searched.

On remand from the supreme court, the Ninth circuit court of appeals dismissed the police official defendants from the lawsuit as the supreme court had held they were entitled to qualified immunity from money damages for their actions.

The appeals court held that the media defendants in this case, including the CNN station, were liable under *Bivens* for violating the plaintiffs Fourth Amendment rights. However, as a non government entity the media defendants are not entitled to assert a defense of qualified immunity.

The state law and federal claims against CNN were remanded to the district court for further proceedings. See: *Berger v. Hanlon*, 188 F.3d 1155 (9th Cir. 1999). ■

### Error in Electronic Docket Tolls Appeal Deadline

The court of appeals for the Eleventh circuit held that a lawyer's reliance on a district court's electronic docketing system to monitor a case's progress would toll the 30 day time limit in which to file a notice of appeal.

As state and federal courts increasingly rely on the Internet to disseminate information, mishaps will inevitably occur.

Wilbert Hollins filed a habeas corpus petition in the U.S. district court in Miami. Hollins' attorney relied on the court's Public Access to Court Electronic Records (PACER) system to monitor the case's progress. PACER allows people to remotely access court records, including the docket, electronically via computer.

Hollins' attorney claimed he never received a written copy of the order denying Hollins' habeas petition. He regularly checked PACER for notice on the case's disposition, but it was never posted. The lawyer learned that the petition had been dismissed fourteen months after the fact by talking to court staff. This was well past the 30 day deadline required to file a notice of appeal.

Hollins' attorney then filed a motion to file a notice of appeal out of time. The court of appeals granted the motion citing "unique circumstances." The court held that since federal courts encourage litigants to rely on PACER it would defeat the program's purpose if mishaps such as this adversely affected litigants.

The court also held that the district court's failure to enter its final order dismissing the case into the PACER system, coupled with the official invitation for litigants to rely on PACER, excused the delay in filing the notice of appeal.

The appeals court ordered the appeal notice to be filed and for briefing to proceed. See: *Hollins v. Department of Correction*, 191 F.3d 1324 (11th Cir. 1999). ■

## ADA Applies to Parole Claims

The court of appeals for the Ninth circuit held that the Americans with Disabilities Act (ADA) applies to claims that prisoners are denied parole primarily due to past histories of substance abuse. The court held that habeas corpus is not the sole remedy for this type of claim. The ruling is significant because it is the first published circuit opinion to apply the ADA to parole claims.

California state prisoners Stephen Bogovich and Charles Thompson are serving life sentences for second degree murder. Both men have received substance abuse treatment while in prison and have been drug free for many years. Since both became statutorily eligible for parole in 1993, they claim they have been denied a release date mainly due to their past history of substance abuse.

The prisoners filed suit in federal court, seeking only injunctive relief, claiming that the California Board of Prison Terms' (BPT) policy of considering their substance abuse history violated Title II of the ADA, 42 U.S.C. § 12132.

The district court characterized the action as one under 42 U.S.C. § 1983 and held that the plaintiffs' sole federal remedy was under habeas corpus. The suit was stayed pending exhaustion of state habeas remedies. The plaintiffs appealed and the court of appeals reversed and remanded.

At the outset, the appeals court noted that the lower court erred in characterizing the complaint as a § 1983 action. Instead, the complaint clearly asserted claims only under the ADA and no other statute.

Discussing the nature of habeas corpus actions, the court noted that claims which would result in shortening the length or duration of a prisoner's confinement must be brought as habeas actions. See: *Preiser v. Rodriguez*, 411 U.S. 475, 93 S.Ct. 1827 (1973).

The ADA prohibits discrimination against people because of a disability. There is no state court exhaustion requirement for ADA claims. (The court did not mention, or discuss, the Prison Litigation Reform Act's requirement of

administrative exhaustion.) The court held it would analyze ADA claims in the prison context under the same standard it analyzes § 1983 claims to determine whether a successful challenge would impact the duration of the prisoner plaintiff's sentence.

Analyzing the plaintiffs' claim under *Butterfield v. Bail*, 120 F.3d 1023 (9th Cir. 1997) and *Neal v. Shimoda*, 131 F.3d 818 (9th Cir. 1997) the court held that the instant case did not challenge the length or duration of the plaintiffs' confinement.

Since they challenged only one of numerous factors used to deny them parole, a ruling in their favor would not guarantee their release. Moreover, they did not claim they had been improperly denied parole nor would they necessarily be entitled to parole if they succeeded on the merits of their ADA claim.

At most, a ruling in their favor would limit the BPT's consideration of substance abuse histories in making future parole decisions. "Not all challenges to a parole board's policy implicate the invalidity of continued confinement."

The court noted it was expressing no opinion on the merits of the ADA claims. The court held the lower court erred when it construed the case to be one for habeas relief.

As a practical matter, a victory in this case on the merits will most likely be meaningless for California prisoners. As reported in this *PLN* issue's cover story, "California's No Parole Board," the state of California has essentially stopped paroling life sentenced prisoners and governor Grey Davis is on record stating he will not parole anyone convicted of murder, regardless of how well they have done in prison.

However, prisoners in states where parole boards still release people may find the ruling useful. Thomas Brown, of the San Francisco office of Heller, Ehrman, White and McAuliffe represented the plaintiffs in this appeal. See: *Bogovich v. Sandoval*, 189 F.3d 999 (9th Cir. 1999). ■

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# Class Action Prisoners Must Show Actual Injury to Maintain Access to Courts Relief

by Matthew T. Clarke

The Sixth Circuit has held that prisoner plaintiffs in a class action access to courts lawsuit must show widespread actual injury to maintain an injunction previously ordered by the federal district court.

This involves two consolidated class-action lawsuits by Michigan state prisoners. The *Hadix v. Johnson* case is ongoing and has been reported extensively in *PLN* for years. In 1976 the Prisoners' Legal Services of Michigan (PLSM) was established using grant money. In 1978, the Michigan Department of Corrections (DOC) began voluntarily funding PLSM. In 1982, DOC announced its intention to cease funding PLSM. Prisoners sued, claiming that, without PLSM, they would not receive adequate access to courts.

The district court found that the prisoners' right of access to courts was being violated and ordered DOC to provide attorneys to prisoners. *Hadix v. Johnson*, 694 F.Supp. 259 (E.D.Mich.1988). Prisoners at prisons not covered by *Hadix* received a similar ruling, *Knop v. Johnson*, 685 F.Supp. 636 (W.D.Mich. 1988). The two cases were consolidated for appeal and the Sixth Circuit found that the DOC's legal access system was inadequate for prisoners who could not read and write English or lacked the intelligence necessary to prepare legal pleadings, specifically holding that "the records contain evidence of a number of specific instances where unassisted inmates suffered individualized harm because of inability to use library resources." *Knop v. Johnson*, 977 F.2d 996 (6th Cir. 1992).

On remand, the district court ordered the DOC to continue funding PLSM and propose a plan for helping prisoners without adequate reading and writing skills. The DOC submitted a proposal of providing prisoner "legal writers" to such prisoners. This was tested in a pilot program. At an evidentiary hearing on the proposal, the district court ordered the parties to file briefs on the influence of *Lewis v. Casey*, 518 U.S. 343 (1996), which had been decided two days earlier. The DOC took the position that, because the

plaintiff's had failed to prove actual injury, as required by *Lewis*, they had no standing to seek prospective relief. The DOC also decided that *Lewis* gave them authority to immediately cease funding PLSM and instructed PLSM to vacate its offices.

The prisoners then filed a motion for a temporary restraining order (TRO) to require the DOC to continue funding PLSM. The district court granted the TRO and later granted a preliminary injunction ordering the DOC to continue funding PLSM until the DOC implemented the legal access plan as modified and approved by the district court. In approving the final plan, the district court stated that it considered the prisoners' access to courts claim in light of *Lewis* and the Prison Litigation Reform Act (PLRA). It also held that, as required by the PLRA, 18 U.S.C. § 3626(a)(1), the relief ordered was narrowly tailored to the inadequacies that cause the actual injury. The DOC appealed the preliminary injunction order on the grounds that the district court had failed to take into account the *Lewis* decision and the PLRA.

Reviewing under the abuse of discretion standard, the Sixth Circuit held that the verbiage in the prior Sixth Circuit *Knop* decision did not establish the DOC's liability as a matter of law. The *Knop* appeal was decided under then current Supreme Court doctrine which had changed when the *Lewis* decision was announced. Under *Lewis*, a prisoner must demonstrate an actual injury to have standing to sue for denial of access to courts. In a class-action context, proving isolated incidents of actual injury is insufficient; the prisoners must prove widespread actual injury.

The Sixth Circuit specifically rejected the prisoners' argument that the *Lewis* actual injury requirement was the same as the Sixth Circuit's pre-*Lewis* actual injury requirement of *Walker v. Mintez*, 771 F.2d 920 (6th Cir. 1985). Under *Walker*, the prisoner need only show that he had "somehow been prejudiced in any of his various lawsuits" while the *Lewis* decision required that the underlying claim

be non-frivolous. Therefore, the *Lewis* standard was new and stricter than the *Walker* standard.

The case was reversed and returned to the district court with instructions for the district court to determine whether there was system-wide actual injury. If no actual injury is found, the suit is to be dismissed. If only a few plaintiffs can show actual injury, the suit would lose its class-action status and remain in effect only with regard to those named plaintiffs. See: *Hadix v. Johnson*, 182 F.3d 400 (6th Cir. 1999). ■

## \$105,000 Awarded in Michigan Wrongful Imprisonment Suit

On April 14, 1999, a Wayne County jury in Michigan awarded Willie Thomas Jr., Larry Reid and Edward Grant \$35,000 in damages each. The three men had been Michigan state prisoners who were released after serving their entire sentences. Several months later, the Michigan DOC ordered their arrest claiming that they had miscalculated the men's sentences.

The men were arrested and imprisoned in the state prison in Jackson without any type of hearing or judicial process. While imprisoned they were held in segregation and denied all phone access as well as any means to contact their families and employers. The men filed suit in state court claiming the defendant prison officials had violated their right to due process of law.

The jury awarded each of the men \$30,000 in compensatory damages and \$5,000 in punitive damages, plus undisclosed attorney fees. Sources did not state how much time the men spent in prison before being released. See: *Thomas v. Pogats*, Wayne County Circuit Court, Case No. 97-704582-N0. ■

Source: *Michigan Trial Reporter*

## Long Term Segregation of Security Threat Group Okay

The U.S. Court of Appeals for the Fourth Circuit held that the long-term segregation of a purported religious sect as a Security Threat Group (STG) violates neither the Free Exercise nor the Equal Protection Clause of the U.S. Constitution. It further held that long-term administrative segregation (ad seg) or maximum custody classification was not cruel and unusual punishment.

In 1995, shortly after Michael Moore assumed control of the South Carolina Department of Corrections (SCDC), the agency applied its STG policy to the members of the Five Percent Nation of Islam (Five Percenters). As a result, about 300 SCDC prisoners, identified as Five Percenters, were placed in ad seg.

SCDC policy states that any prisoner classified as an STG member receives notice of the fact, is segregated and given an opportunity to respond, but not necessarily in that order. The only way out is for the SCDC Director to remove the STG designation from the group, or for the SCDC to recognize that the prisoner was misidentified as an STG member. A prisoner could also simply renounce his affiliation with the STG.

Also in 1995, forty-two Five Percenters individually sued three SCDC officials, including Moore, challenging the validity of the STG policy. After these cases were consolidated, the prisoners' amended complaint alleged that their STG long term confinement violated their First, Eighth and Fourteenth Amendment rights. The prisoners moved for a preliminary injunction, and prison officials moved for summary judgment. The district court granted the latter, and the prisoners appealed.

Although the fact was hotly disputed, both the trial and appellate courts assumed that Five Percenters are a bona fide religious group entitled to First Amendment protection. After paying lip service to prisoners' constitutional protections, the appellate court outlined the "highly deferential" nature of its review. In essence, once the SCDC "demonstrates that it is pursuing a legitimate governmental objective, and shows some rational relationship between the objective and the means chosen to achieve" it, the method will be validated. Based on this, the court approved the STG policy.

In this case, the Five Percenters also challenged the STG policy as it applied to them. To decide this issue, the court employed the four prong test from *Turner v. Safley*, 482 U.S. 78 (1987). On the basis of a few isolated incidents involving Five Percenters and some out of state reconnaissance, the court determined that the designation of "the Five Percenters as an STG was eminently rational."

The court also reasoned that prisoners could exercise their religious practices adequately in ad seg, that further accommodations would be too costly, and that ready alternatives do not exist. It rejected the contention that "an individualized assessment" of a prisoner's "dangerousness" should be required before any individual prisoner is segregated under the STG policy. In any event, the court concluded that the confinement of Five Percenters does not violate the Free Exercise Clause of the First Amendment.

The court curtly rejected the prisoners' equal protection claim, noting that they failed to offer any "evidence that similarly situated groups of inmates-religious or otherwise-have been treated differently," much less discriminatorily under the STG policy.

In analyzing the prisoners' Eighth Amendment claim, the court noted that the prisoners do not contend that the SCDC fails to provide their basic human needs. It thereby determined that indefinite duration alone does not render segregation unconstitutional. Although it recognized depression and anxiety as "unfortunate concomitants of incarceration," it did not find the condition to be "extreme" enough to be an Eighth Amendment violation.

In deciding this case, the court apparently disregarded a basic precept of summary judgment procedure by resolving issues of material fact itself, like whether Five Percenters were an inherently violent group. To justify this *ad hoc* practice, the court reasoned that to do otherwise "would turn *Turner's* command of judicial deference on its head." In essence, the Fourth Circuit has implicitly adopted a rule of procedure unique to prisoner litigation, and in the process, affirmed the judgment of the trial court. See: *In Re Long Term Administrative Segregation*, 174 F.3d 464 (4th Cir. 1999). ■

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## Seventh Circuit Prisoners Must Exhaust Futile Grievance Remedies

In two separate rulings, the Seventh Circuit Court of Appeals has held that prisoners must exhaust administrative remedies before filing suit, regardless of the relief sought and no matter how ineffectual the prison grievance system may be.

Eduardo Perez, a Wisconsin state prisoner incarcerated in Texas, slipped, fell and injured his back. A Texas physician recommended surgery. The Wisconsin Department of Corrections (DOC) refused to approve the surgery and ordered a regime of exercise, physical therapy and Ibuprofen. Perez sued the DOC seeking damages for cruel and unusual punishment.

The DOC moved to have the suit dismissed because Perez failed to file an administrative grievance prior to bringing suit as required by 42 U.S.C. § 1997e(a), the Administrative Remedies Exhaustion provision of the Prison Litigation Reform Act. Instead of ruling on the motion, the district court ruled against Perez on the merits. The DOC appealed.

The Seventh Circuit held that § 1997e(a) precludes Perez from bringing suit if he has not exhausted administrative remedies. Adopting the reasoning of *Alexander v. Hawk*, 159 F.3d 1321 (11th Cir. 1998), the court ruled that, while the exhaustion requirement is not jurisdictional, it is a requirement which must be met by prisoners prior to bringing suit. Because there is no provision allowing the disposal of the suit adversely to the prisoner even if the administrative remedies are not exhausted, the fact that the district court decided the case against the prisoner is of no consequence. The defendants have a valuable right under the PLRA to have the suit dismissed rather than decided. It did not matter that Perez had in the meantime exhausted administrative remedies. The statute specifically states that exhaustion must occur before the suit is brought.

The court also held that it does not matter if the suit seeks only monetary damages and the grievance procedure doesn't allow for monetary claims. The court hedged a bit by noting that there might be circumstances in which no relief was possible through the grievance procedure, but this was not one of them. In a

case of double speculation, the Seventh Circuit reasoned that because Perez claimed that the injury was ongoing and because he might gain the surgery he seeks through the grievance procedure, it could reduce future damages and show that the DOC was not deliberately indifferent (thus undermining the legal basis of the suit).

Readers should note that the circuits are split on this matter with the Sixth, Seventh, and Eleventh Circuits of requiring prison grievance exhaustion under all circumstances. *Alexander*; *Brown v. Tombs*, 139 F.3d 1102 (6th Cir. 1998). The Fifth, Ninth, and Tenth Circuits allow suits for monetary damages without the prior filing of a grievance if the grievance system does not allow the relief requested. *Whitley v. Hunt*, 158 F.3d 882 (5th Cir. 1998); *Lunsford v. Jumao-As*, 155 F.3d 1178 (9th Cir. 1998); *Garrett v. Hawk*, 127 F.3d 1263 (10th Cir. 1997); *Rumbles v. Hill*, 182 F.3d 1064 (9th Cir. 1999). To avoid such problems with the PLRA exhaustion requirement, *PLN* continues to recommend that all prisoners exhaust their administrative remedies before filing suit. See: *Perez v. Wisconsin Dept. of Corrections*, 182 F.3d 532 (7th Cir. 1999).

The Court of Appeals for the Seventh Circuit reiterated this position in a later case. Michael Massey, a federal prisoner in Illinois, filed suit claiming a violation of his Eighth amendment rights when he was denied hernia surgery. The appeals court held that Massey had to exhaust his administrative remedies under 42 U.S.C. § 1997e(a) regardless of how futile those remedies might be.

"The potential effectiveness of an administrative remedy bears no relationship to the statutory requirement that prisoners first attempt to obtain relief through administrative procedures... [W]hether the administrative process actually produces a result that satisfies the inmate is not the appropriate inquiry. Instead, courts merely need to ask whether the institution has an internal administrative grievance procedure by which prisoners can lodge complaints about prison conditions. If such an administrative process is in place, then 42 U.S.C. § 1997e(a) requires inmates to exhaust

those procedures before bringing a prison conditions claim under § 1983. [Editor's Note: This suit was a Bivens claim.]

As an interesting practical note, the court held that failure to exhaust administrative remedies constitutes an affirmative defense under Fed.R.Civ.P. 8(c). This means that defendants bear the burden of pleading and proving the defense. Readers should note that some circuits have held that administrative exhaustion under the PLRA is a pleading requirement prisoners must meet when they file suit and indeed, may be required to attach the grievance responses to the complaint itself. See: *Massey v. Heiman*, 196 F.3d 727 (7th Cir. 1999). ■

## California PIA Chief, Folsom Mayor, Arrested

On January 27, 2000, Reggie "party meister" Drew, 57, was arrested in a room at the B-7-B Motel in a seedy industrial area of North Sacramento. Drew was charged with five felony and misdemeanor counts for soliciting an undercover policewoman for unspecified sex acts. Drew allegedly offered to pay for sex with cash and crack cocaine. Drew also faces forfeiture of his pick up truck under a new law allowing for the confiscation of vehicles used to facilitate prostitution and drug crimes.

Drew is employed as chief of quality assurance for the California Prison Industry Authority at the prison complex in Folsom. Drew is paid \$74,484 a year by the PIA.

Drew had also been mayor of the city of Folsom since 1996. Drew had given the Folsom city council a "state of the city" address a few hours before his arrest. He resigned as mayor two days after the arrest, after spending the night in jail. Drew had no comment for the media on his arrest. He remains employed by the PIA. ■

Source: *Associated Press*

## Pretrial Cold Cell Violates Fourteenth Amendment

by Ronald Young

Paper Wings

A federal district court in Illinois held that a pretrial detainee's alleged exposure to low temperature in a detention cell, while naked and with no alternative means of protecting himself from the cold, supported a claim of inadequate shelter against county jail deputies and thus stated a claim of deliberate indifference. The court also held that the deputies' alleged thwarting of medical treatment given to pretrial detainee, supported a claim for violation of his right to medical attention. The court further held that the pretrial detainee stated a claim against county jail deputies for conspiring to interfere with his civil rights.

Stanley Anton, a pretrial detainee held in the Dupage County Jail, filed a 42 U.S.C. § 1983 civil rights action alleging, among other things, that he was subjected to unconstitutional conditions of confinement when he was placed naked into an extremely cold cell. Anton complained that Dupage County Sheriff's Deputies Kretovic and Zamora conspired to interfere with his civil rights by withholding medical attention and adequate heat. The two jailers delayed for several hours in responding to Anton's continuous pleas of being extremely cold. When two nurses finally arrived, they found Anton's body temperature was three degrees below normal, and so they gave him a blanket. Afterward, the two jailers removed the blanket, only to give Anton a different one later on.

Anton alleged that Kretovic and Zamora violated his Fourteenth Amendment rights and that the two conspired to do so. Unlike convicted prisoners whose constitutional protections in such a case would be based on the Eighth Amendment, pretrial detainees are protected under the Fourteenth Amendment. However, Eighth Amendment analysis is still used in deciding such cases. See: *Tesch v. County of Green Lake*, 157 F.3d 465 (7th Cir. 1998).

The court stated that "Anton has sufficiently alleged a claim of inadequate shelter against Kretovic and Zamora." The court found that although temporary exposure to cold

conditions doesn't necessarily "rise to the level of a constitutional violation," in Anton's case the fact that he was naked and had no alternative means of protecting himself from the cold did create an unlawful condition.

Accordingly, the court also found that Kretovic and Zamora acted with deliberate indifference. Their actions were seen as "unprofessional" and "deplorable." "Kretovic and Zamora thwarted the medical attention given to Anton by removing the blanket, even though by that time they must have known the severity of Anton's circumstances."

Thus the court concluded that "Anton has stated a claim of deprivation of his constitutional rights against Kretovic and Zamora in their individual capacities." Furthermore, the jailers knowingly deprived Anton of necessary medical treatment. The law is clearly established "that pretrial detainees have the constitutional right to adequate medical attention" so that Kretovic and Zamora are not entitled to qualified immunity.

As for the conspiracy allegation, the court stated that Anton must demonstrate "(1) an express or implied agreement among defendants to deprive plaintiff of secured constitutional rights and (2) an actual deprivation of those rights in the form of overt acts in furtherance of the agreement." See: *Fantasia v. Kinsella*, 956 F.Supp. 1409 (N.D. Ill. 1997). The court concluded that the totality of the facts showed Anton had "sufficiently alleged an agreement between Kretovic and Zamora." Also that Anton alleged overt acts by Kretovic and Zamora in furtherance of the agreement. These being removal of the blanket, their continual taunts, and their failure to provide Anton with alternative means of protection from the cold.

At this stage of the proceedings the court found that Anton has sufficiently stated a claim against Kretovic and Zamora for conspiring to interfere with his civil rights. See: *Anton v. Sheriff of Dupage County, Ill.*, 47 F.Supp.2d 993 (ND IL 1999). ■

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### Attention Prisoners!

Due to increasing postage and printing costs PLN can no longer avoid increasing its prisoner subscription rate to \$18 per year from our current rate of \$15 a year. We delayed increasing our prisoner subscription rates for over two years. The new subscription rate goes into effect on August 1, 2000. Prisoners can subscribe, renew lapsed subscriptions or extend current subscriptions for as many years as they want at the \$15 rate until then.

..... After August 1, 2000, we will pro-rate subscriptions at \$1.50 an issue, or \$9 for six issues and \$18 for a full year. Subscription rates for professionals/institutions (\$60 per year) and non prisoners (\$25 per year) will remain the same as we raised those rates in 1998. As always, prisoners can pay for their subscriptions with new, unused stamps and embossed envelopes.

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# En Banc Ninth Circuit Upholds Jail Porn Ban

By Paul Wright

In the February, 1999, issue of *PLN* we reported *Mauro v. Arpaio*, 147 F.3d 1137 (9th Cir. 1998) where a panel of the Ninth circuit appeals court held that a jail policy banning all sexually explicit material was unconstitutional. That ruling was vacated when the court decided to rehear the case en banc. See: *Mauro v. Arpaio*, 162 F.3d 547 (9th Cir. 1998). [*PLN*, Apr. 1999]

In a 7-4 ruling, the en banc court reversed the panel ruling and upheld the policy. Besides largely eliminating the First amendment rights of prisoners to a degree no other circuit ruling to date has done, the court took another unprecedented step when it decided that the "reasonableness" test of *Turner v. Safley*, 482 U.S. 78, 107 S.Ct. 2254 (1987) can be applied to pretrial detainees who have yet to be convicted of any crime.

Jonathan Mauro was a pretrial detainee in the Maricopa county (Phoenix) jail in Arizona. He attempted to subscribe to *Playboy* but his request was denied by jail officials under a jail policy that banned any publications that were "sexually explicit." Sexually explicit was defined as anything "that shows frontal nudity," including personal photos, drawings, magazines and pictorials. Mauro filed suit claiming the policy violated his right to free speech. The district court granted summary judgment to the defendants and Mauro appealed.

The en banc court held that the ban on sexually explicit materials was designed to reduce the sexual harassment of female jail guards. The county jail claimed it had adopted the policy because prisoners would make derogatory remarks about the guards' anatomy, compare the guards' bodies to those of models in sexually explicit magazines, etc. The court held that reducing the sexual harassment of female guards is a legitimate penological interest and that banning all publications that depict frontal nudity is a rational means to accomplish that goal.

The Maricopa county jail is run by sheriff Joe Arpaio, the self styled "toughest sheriff in America." *PLN* has previously reported Arpaio's antics which include: housing prisoners in tents, feeding them green bologna sandwiches,

making them wear pink underwear, instituting chain gangs as well as more serious issues such as endemic brutality and inadequate medical care with the occasional revolt by oppressed prisoners in the jail. In extensive public interviews, Arpaio has stated he banned sexually explicit materials in the jail solely for the purpose of punishing jail prisoners and imposing more punitive conditions on them. Indeed, in one interview, after the Ninth circuit panel had initially reversed the policy, Arpaio told the *Arizona Republic* that he would never let prisoners receive "pornographic magazines", regardless of what the court might rule.

The court held that because the parties had not raised the issue of punishment being a motive for the ban in their briefs, the issue was waived. The court noted with approval that the policy is not vague in that it simply censors all material that depicts frontal nudity. That this includes in its sweep artistic, medical or scientific materials is immaterial. The court held that while the policy banned all materials depicting frontal nudity it did not ban sexually explicit letters between prisoners and others, nor did it ban sexually explicit books and magazines without photos or photos of clothed women that were sexual in nature. The court held that this constituted an "alternative means of expression" for Mauro as he was free to read sexually explicit materials, he just couldn't look at them.

The court upheld the ban on any pictorial depictions of frontal nudity. Just as professional prisoner bashing demagogues like Arpaio have imposed, meanspirited, punitive conditions of confinement on prisoners for the simple reason that they have the power to do so and can reap some political advantage, so too have some members of the judiciary jumped on the bandwagon and given these punitive conditions the constitutional seal of approval.

With absolutely no discussion the court grafted the *Turner* standard onto claims made by pretrial detainees. Until now, claims by pretrial detainees have always been analyzed under *Bell v. Wolfish*, 441 U.S. 520 (1979). Since pretrial detainees have yet to be convicted of any crime

and are, at least nominally, innocent of any crime, they cannot be "punished." Further, because of their status as unconvicted citizens the state can claim no legitimate interest in punishing or rehabilitating them. Significantly, in this case the court did not mention *Bell* or its applicability to claims by pretrial detainees.

Right wing social conservatives have frequently found that American prisoners are the only population politically weak enough for them to impose the social cleansing policies they yearn to impose on society as a whole. As *PLN* has reported in past issues, this includes prohibiting abortion, banning pornography, mandating Christianity and the wholesale censorship of ideas. These are all commonplace occurrences in American prisons and jails. The occasional court ruling in favor of prisoners being allowed to receive sexually explicit materials has met with howls of indignation and a chorus of abuse for the judges who dare issue such rulings. See *Waterman v. Verniero*, 12 F.Supp.2d 378 (D.N.J. 1999) for one judge's description of the public abuse he was subjected to after he struck down New Jersey's ban on sexually explicit materials at one prison. It appears that the ninth circuit in this case, perhaps concerned at congressional efforts to split the circuit, decided to take the easy way out and uphold the Maricopa county jail policy.

To their credit, circuit judges Schroeder, B. Fletcher, Thomas and Kleinfeld dissented from the majority ruling by pointing out the policy does not serve the purpose it was supposedly enacted to address and the defendants were not properly granted summary judgment. As the dissent points out, if the jail wants to discourage the sexual harassment of female guards they could enact disciplinary rules prohibiting such conduct and duly punish the prisoners who violated the rule.

Other circuits to recently consider the censorship of sexually explicit materials by prison officials have upheld the bans. See: *Amatel v. Reno*, 156 F.3d 192 (DC Cir. 1999) and *Waterman v. Verniero*, 183 F.3d 208 (3rd Cir. 1999). The policy upheld in

this case is far broader than the others and until or unless the supreme court rules otherwise, challenges to prison and jail bans on sexually oriented materials are unlikely to succeed in these circuits. See: *Mauro v. Arpaio*, 188 F.3d 1054 (9th Cir. 1999)(en banc). ■

### **\$3,000 Awarded in Wrongful Release Suit**

On October 29, 1999, the New York court of claims awarded \$3,000 in damages to Frank Nicchio. Nicchio was a New York state prisoner who was wrongly held 30 days past his release date from prison. Nicchio was granted summary judgment on the issue of liability. The case went to trial solely on the issue of damages.

The court held that Nicchio was entitled to no other damages beyond those for 30 days of loss of liberty. The court held that Nicchio had suffered no loss of reputation, wages or emotional distress to justify a higher damage award. See: *Nicchio v. State of New York*, Claim No. 86620. Court of Claims, White Plains. ■

Source: *New York Jury Verdict Reporter*

### **Inmate Classified**

## **Denial Of Food & Medicine Supports Eighth Amendment Claim**

*by Ronald Young*

The court of appeals for the Seventh circuit held that a prisoner's medical condition was sufficiently serious to support an Eighth Amendment claim, and material fact issues existed as to whether officials acted with deliberate indifference toward the prisoner's serious medical condition.

Orrin S. Reed, a prisoner at the Westville Correctional Facility (WCF) in Westville, Indiana, appealed the district court's grant of summary judgment to the defendants on his 42 U.S.C. § 1983 civil suit.

Reed suffers from many serious ailments that require doctor-prescribed life sustaining medication. In his complaint Reed alleges that WCF superintendent Daniel McBride, Commissioner H. Christian De Bruyn, and Indiana DOC regional director Bruce Lemmon were aware that on many occasions he was not permitted to receive food or medication from prison authorities.

Reed's suit alleges Eighth Amendment violations, claiming that "the denial of doctor-prescribed medicine led to agonizing and extreme pain, internal bleeding, violent cramps and periods of unconsciousness." He also alleged that prison officials withheld food from him several times for periods of three to five days, denying him the "minimal civilized measure of life's necessities."

The named officials were made aware of these deprivations through letters Reed sent to them, but they refused to intervene in the matter. The defendants offered no evidence that they were unaware of Reed's condition or if any remedial action had been taken. They did, however, acknowledge the receipt of two of Reed's letters. The appeals court noted that "the only reason that these defendants may be held liable is because Reed's complaints were directly addressed to and received by them." See: *Vance v. Peters*, 97 F.3d 987 (7th Cir. 1996).

The appeals court concluded that Reed's maladies resulting from the alleged

denial of medical care "constituted a serious medical condition." The defendants argued that the lengthy deprivation of food "is not of an objectively serious magnitude to constitute an Eighth Amendment violation." But the court noted that Reed "was already infirm, and an alleged deprivation of food could possibly have more severe repercussions for him than a prisoner in good health."

According to the court, Reed satisfied the "sufficiently serious" component of his claim. The appeals court also found that the defendants' acknowledged receipt of Reed's letters and grievances satisfied the requirement that a defendant be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists for the plaintiff.

The defendants also argued that the court should look at the totality of medical care provided to Reed and not just the few instances that Reed complains of.

The appeals court agreed, but found that "while Reed often received adequate care, there were allegedly a number of occasions that were 'markedly atypical' .... Thus, if true, the claimed three to five day deprivations of food and medicine undermine the defendants' claim that the totality of the plaintiff's medical care shows that they were not deliberately indifferent."

The appeals court concluded that Reed "can show a genuine issue of material fact regarding his Eighth Amendment claim," and that taking his claim as true the court found Reed has suffered a "prototypical case of deliberate indifference" and his burden to show an inadequate response is fulfilled.

The grant of summary judgment by the district court to the defendants was reversed, and the case was remanded for trial on the merits. See: *Reed v. Mc Bride*, 178 F.3d 849 (7th Cir. 1999). ■

## South Carolina Prisoner Wins Excessive Use Of Force Suit Pro Se

By Matthew T. Clarke

In an unpublished opinion, the Fourth Circuit court of appeals has held that a South Carolina federal district court improperly failed to consider a prisoner's affidavit regarding an assault and torture by guards and the videotape of portions of the incident when it granted the guards summary judgment. The prisoner then won a jury verdict and substantial monetary award at the ensuing trial.

Michael R. McCreight, a South Carolina state prisoner, filed a civil rights action under 42 U.S.C. § 1983, alleging that guards beat him, tortured him, knocked him out, sprayed mace in his face, and, while he was in a four point restraint, threatened to anally rape him. He also alleged that, while this was going on, prison nurses refused to treat him. He claimed they used excessive and were deliberately indifferent to his serious medical needs.

In front of a guard, McCreight flushed a pen the guard had loaned him to sign a document. Sgt. Sessions, another guard, then came to McCreight's cell, demanded the pen and sprayed mace in McCreight's face and onto his body, stating that he had "waited a long time to teach (his) sorry white ass a lesson." Sessions returned later and ordered McCreight to his door to be restrained. McCreight complied, offering no physical resistance.

Two other guards, Seaward and Salmond, allegedly entered McCreight's cell, slammed his head into a brick wall, squeezed his testicles, and bent and twisted his back. They took him into the hall at which point McCreight heaped verbal abuse upon the guards. As shown in a videotape, Salmond then purposely tripped McCreight with a steel chain Salmond had wrapped around McCreight's legs, causing McCreight's head to strike a wall, knocking him unconscious.

McCreight had a documented history of lower back pain caused by spinal sterosis and a bulging disc. When McCreight regained consciousness, he had severe back pain. He was examined by two prison nurses where he lay in an unconscious or semi-conscious state, who left after wiping blood off his face with toilet paper.

The guards then dragged McCreight into a shower area where they stomped and kicked him in the legs and stomach. McCreight was carried back to his cell where he said that Salmond and others kicked him and slammed his head against a metal door frame and concrete floor. He was allowed to shower, then placed face down and naked on his wooden bed in four point restraints for four hours. During the four hours, guards repeatedly came to his cell door, threatening him, making lewd comments and telling him they were going to rape him anally while simulating entering his cell.

The lengthy videotape never shows McCreight resisting the guards. Even though the view was often blocked by guards, what is visible corroborated McCreight's allegations both of the guards use of excessive force and the extent of his injuries. Despite this evidence, the district court granted the defendants summary judgment on all issues.

Continuing to represent himself, McCreight appealed. Normally hostile to prisoners' suits, the Fourth Circuit found that "the district court improperly applied the summary judgment standard by failing to give proper consideration to McCreight's affidavits and to the video-

tape." The affidavits and videotape presented a "detailed factual account of the incident which, if believed, supports an excessive force claim." The use of four point restraints, in this case, to cause or greatly exacerbate a back injury and inflict unnecessary and wanton pain without any penological justification violated the Eighth Amendment. The evidence regarding the nurses' actions was not so damning, but still sufficient to overcome summary judgment. Therefore, the Fourth Circuit reversed the case and returned it to the district court for trial on the excessive use of force and deliberate indifference to serious medical needs claims.

In the trial, the jury found that Sessions, Salmond, and Seaward had used excessive force and order them to pay \$5,000.00 in compensatory damages and \$5,000.00 in punitive damages with a 4.72% interest rate. McCreight was also awarded costs. The district court entered judgment in favor of the nurses.

It is interesting to note that this, one of the few favorable rulings for a prisoner in the prisoner-hostile Fourth Circuit, is an unpublished ruling. See: *McCreight v. Davis*, No. 97-7826 (4th Cir. Jan. 13, 1999); CA: 6:96-1835-23 (USDC D.S.C.-Greenville Div. 1999). ■

### Contribute to PLN's Matching Grant Campaign

A PLN supporter will provide a matching grant for all individual donations made to PLN between March 1, 2000 and January 15, 2001, up to and including \$15,000. The matching grant does not apply to money sent to PLN to pay for subscriptions, buy books or to grants from foundations. It applies only to individual donations. Donations by non prisoners will be matched dollar for dollar up to \$500. Donations by prisoners will be matched at the rate of two dollars for every dollar given. All donations are tax deductible. New, unused stamps and embossed envelopes are fine. If you haven't donated to PLN's Matching Grant Campaign yet, please do so now. No amount is too small and every little bit helps. We will announce the amount raised in our February, 2001 issue unless we meet the \$15,000 goal before then.

# Tenth Circuit Holds Prison Officials Liable For Failing To Provide Religious Meals

The Tenth Circuit court of appeals has held that prison officials unconstitutionally interfered with a punitive segregation prisoner's exercise of religion when they failed to accommodate the needs of his religious beliefs by delivering Ramadan meals at appropriate times.

Akeem Abdul Makin, a former Colorado state prisoner and a Muslim, filed a lawsuit under 42 U.S.C. § 1983, alleging that prison officials violated his First Amendment right to free exercise of religion by interfering with his ability to fast between dawn and sunset during the Muslim holy month of Ramadan when they refused to deliver him meals between sunset and sunrise while he was housed in punitive segregation. Makin was able to maintain the fast by saving non-spoilable portions of meals until the proper time, but it was extremely difficult to do so and he was unable to enjoy the full spiritual experience of Ramadan.

The district court concluded that George E. Sullivan, deputy director of operations for the Colorado Department of Corrections (DOC), and H. B. Johnson, superintendent of the Colorado Territorial Correctional Facility violated Makin's free exercise rights when they promulgated the policy of serving specially-timed Ramadan meals and did not apply it to prisoners in segregation. It computed damages for the denial of the right at \$300 per day for a total of \$9,000 and assessed the damages against the defendants. The defendants appealed, claiming that the district court improperly denied their motion for summary judgment based upon qualified immunity, they didn't violate Makin's First Amendment rights because he was able to fast during Ramadan, and the court's determination of damages was flawed.

The Tenth Circuit held that, because the defendants failed to object to the report and recommendation of the magistrate judge recommending denial of their motion for summary judgment, they waived the issue of qualified immunity and could not appeal it. The court also held that the defendants' argument that,

because Makin was able to fast, they did not burden his religion was specious. They noted that the spiritual quality of Makin's Ramadan had been diminished and that to defendants' position was essentially that prison officials could burden a prisoner's observance of his religion for no legitimate reason at all so long as the prisoner was strong enough to withstand the burden. Both burdening a prisoner's religious observance without a legitimate penological justification and making the observance dependent on the strength of the prisoner are unconstitutional. Therefore, the Tenth Circuit upheld the verdict in Makin's favor.

On the issue of damages, the Tenth Circuit held that the district court erred when it based its award of damages upon the abstract value of the denial of freedom to exercise religion. Under *Memphis Community Sch. Dist. v. Stachura*, 477 U.S. 299 (1986), awards in § 1983 actions must be based upon actual injuries, not the abstract value of a constitutional right. Therefore, the Tenth Circuit affirmed the verdict but vacated the damage award and returned the case to the district court for a recalculation of damages. See: *Makin v. Colorado Dept. of Corrections*, 183 F.3d 1205 (10th Cir. 1999). ■

## Qualified Immunity Granted for Pre-1996 ADA Violation

The court of appeals for the Sixth Circuit held that it was not clearly established before 1996 that the Americans with Disabilities Act, (ADA), and Rehabilitation Act of 1973, (Rehabilitation Act), apply to state prisoners. As such, the court concluded that prison officials were entitled to qualified immunity for ADA and Rehabilitation Act violations occurring before 1996.

David Key, a hearing impaired prisoner of the Michigan Department of Corrections, (MDOC), brought suit alleging that prison officials violated the ADA and Rehabilitation Act when they refused to allow him to participate in group therapy for sex offenders.

Prison officials claimed that Key was denied treatment because his need for an interpreter would violate the confidentiality of others in treatment. Key asserted, however, that this constitutes an impermissible form of disability discrimination.

In his initial complaint, Key sought only injunctive relief, requesting an order requiring MDOC to provide him with an interpreter for treatment or an order prohibiting the Michigan Parole Board from considering his lack of treatment in any parole decisions.

Defendants requested summary judgment, arguing that the ADA and Rehabilitation Act did not apply to state prisons. The district court denied the

motion. Key then filed an amended complaint, seeking monetary damages and defendants filed a motion to dismiss and for summary judgment, arguing that qualified immunity is a complete defense to Key's claim for monetary damages.

The district court denied defendants' motions, concluding that at the time of the alleged violations, the law was clearly established that the ADA and Rehabilitation Act applied to state prisoners. *Key v. Grayson*, 998 F.Supp. 793 (E.D.Mich. 1998). [PLN, Feb, 1999]

The Court of Appeals observed that it has been clearly established that the ADA and Rehabilitation Act apply to state prisoners since the Supreme Court decision in *Pennsylvania Department of Corrections v. Yeskey*, 524 U.S. 206, 118 S.Ct. 1952 (1998) [PLN Sep, 1998]. The court reversed the district court, however, holding that it was not clearly established before 1996. Accordingly, the court concluded that defendants were entitled to qualified immunity with respect to Key's monetary claims and remanded the case to the district court for further proceedings.

Because qualified immunity applies only to monetary damage claims, Key's claims for injunctive relief were not affected by the court of appeals decision. See: *Key v. Grayson*, 179 F.3d 996 (6th Cir. 1999). ■

## News in Brief

**AR:** On January 17, 2000, the state prison system banned all tobacco products on prison property. The ban affects 12,000 prisoners and 3,000 employees.

**Brazil:** On January 1, 2000, riot police stormed the Presidente Bernardes Penitentiary to end a 60 hour uprising by hundreds of prisoners demanding transfers to other prisons. Two of the uprising's prisoner leaders were shot and killed by police, another four prisoners were wounded. Three hostage guards were rescued unharmed.

**CO:** On December 4, 1999, Bob Sylvester, the director of the Dismas halfway house in Denver, was charged in state court with racketeering, extortion and sexual assault. Prosecutors claim that Sylvester coerced the male residents of the halfway house to have sex with him or he would have them returned to prison. Sylvester is an ex convict who served time for fraud. The Colorado DOC cancelled its contract with Sylvester in 1998 citing mismanagement, filthy conditions and reports of Sylvester sexually preying on the parolees. Prisoner rights advocate Sandi Gostin-Izon noted the Colorado DOC knew of Sylvester's sexual habits as early as 1991 and continued its contract with him.

**CT:** On November 17, 1999, prisoner Pryant Wiseman, 23, died after getting into a fist fight with another prisoner at the Garner Correctional Institution in Newtown. The cause of death was unknown despite an autopsy by the state medical examiner.

**Jamaica:** On January 5, 2000, at least 1,000 of the nation's 1,500 prison guards called in sick to protest the two year renewal of Lt. Col. John Prescod's contract as head of the Jamaican prison system. Army soldiers ran the country's prisons during the sick out.

**Mexico:** In December, 1999, Raul Zarate Diaz, warden of the Tapachula prison, fell to his death while spying on prisoners having conjugal visits with their spouses. Zarate tripped and fell through a skylight, landing and dying next to a prisoner and his wife having sex. Police investigators found binoculars and a pornographic magazine on the roof where the warden had been watching.

**MO:** On October 29, 1999, prisoner Terry Banks, 26, walked out of the Crossroads Correctional Center in Cameron in

a prison guard's uniform supplied to him by his lover, prison guard Lynette Barnette, 27. The pair were arrested on December 18, 1999, in a Victoria, Texas trailer park after they were featured on "America's Most Wanted." Banks was serving a life sentence for a 1992 murder.

**Nigeria:** On January 4, 2000, the Nigerian government announced that as a one time gesture it would release on compassionate grounds all prisoners that had been on death row more than 20 years. Prisoners who spent 10-20 years on death row had their sentences commuted to life.

**NJ:** In late 1999, Burlington county jail guard Wendell Bibb, 27, was sentenced to 10 years in state prison for raping three prostitutes. Bibb would pick up the women and force them to have sex with him without payment by either pulling a gun or showing them his jail guard badge. Similar charges against Bibb in two other counties were dropped.

**NM:** On January 15, 2000, former Native American prisoner rights activist Timothy "Little Rock" Reed, 39, died in a car accident in Albuquerque. Hitchhikers in the vehicle with him said Reed had been drinking when his SUV rearended a car, causing his vehicle to roll over into another lane. Reed was the only fatality. Reed gained prominence, as previously reported in *PLN*, when the New Mexico Supreme Court declared him a "fugitive from injustice" and refused an extradition request from Ohio where Reed was sought for allegedly violating his parole.

**OH:** On January 5, 2000, Donald Christian, 48, was charged with theft for seeking a \$104 reimbursement for mileage he did not drive. Christian worked at the Lorain Correctional Institution in Grafton as a drug treatment counselor at the time of his arrest. Christian had previously served three years in prison on drug charges in the 1980s.

**VA:** In 1999 the state of Virginia received \$109 million by housing 3,500 prisoners from other states in its prisons.

**VA:** On December 20, 1999, Henrico county sheriff deputy Reginald Dale, 27, was charged in state court with one felony count of carnal knowledge and sodomy. Prosecutors allege that Dale had consensual sex with a woman prisoner at the jail.

**WA:** On June 19, 1999, Gary M. Davis was sentenced to 40 years in prison for

placing a bomb that seriously injured parole officer Tom Perine in an Aberdeen bombing. [*PLN*, Jun. 1999] Davis pleaded guilty in Grays Harbor superior court to attempted first degree murder in the bombing. Steven Pink, the drug dealer who asked Davis to carry out the bombing and then turned him in, was convicted at trial on charges of conspiring to commit first degree murder. Pink was sentenced to 62 years in prison.

**WV:** In November 1999, an audit of the Northern Correctional Facility in Shepardstown revealed that \$155,330 was missing from the prison's commissary account. Watches, clothes and compact disks had been bought with funds from the account and were given to prisoners for resale to other prisoners. Prison employees received a percentage of the sales. Five unnamed employees were fired over the missing funds and the lack of accurate inventories and sales receipts.

**WY:** Prison officials at the Wyoming State Penitentiary at Rawlins thwarted an escape attempt on October 18, 1999 when they discovered a partially completed tunnel. DOC spokeswoman Melinda Brazzale noted the tunnel was underneath a temporary housing unit located some distance from the perimeter fence, but said "they were working their way in that direction." ■

### The Irish People

Want to know what's going on in Ireland? *The Irish People* reports the activities of groups and organizations that struggle together to end the British occupation of Northern Ireland. *The Irish People* also reports on American politics and events which directly affect the situation in Ireland. This paper has excellent reporting on Irish Republican political prisoners, ex prisoners, their activities and the ongoing struggle for the release of all political prisoners in Ireland and. This weekly tabloid is the best source of news on these issues. Subscriptions are only \$30 for 52 Issues. Contact: The Irish People 363 Seventh Ave. New York, NY 10001 (212) 736-0107 website: <http://inac.org/>

**Special 10th  
Anniversary  
Issue!**

# Legal News

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*Working to Extend Democracy to All*

May 2000

## The History of Prison Legal News

*by Paul Wright*

In May, 1990, the first issue of *Prisoners' Legal News (PLN)* was published. It was hand typed, photocopied and ten pages long. The first issue was mailed to 75 potential subscribers. Its budget was \$50. The first 3 issues were banned in all Washington prisons, the first 18 in all Texas prisons. Since then we have published 120 consecutive issues, grown to offset printing of 32 page issues and now have around 3,200 subscribers in all 50 states as well as in 23 countries. This is how it happened.

### Inside

From the Editor ..	6
Hep C in Colorado DOC	7
Washington Civil Commitment	8
NM Phone Rates Challenged	9
Post Conviction Update	12
Ohio Parole Scam	15
Florida Prison Health Care	16
Palestinians Imprisoned	19
Texas Death Row Hungerstrike	20
DC Nude Dancing	23
News in Brief	26
Transsexual Privacy Right	28
IL Death Penalty Moratorium	31

In 1987 I entered the Washington state prison system with a 304 month prison sentence. In 1988 I met Ed Mead, a political prisoner and veteran prison activist, at the Washington State Reformatory (WSR) in Monroe, Washington. Ed had been imprisoned since 1976. In that period he had been involved in organizing and litigating around prison conditions and issues. He had also started and published several newsletters, including *The Chili Factor*, *The Red Dragon*, and *The Abolitionist*. By late 1998 Ed and I were jointly involved in class action prison conditions litigation and other political work. Ed's last newsletter, *The Abolitionist*, had fallen apart over differences he had with the editorial board.

As the 1980s ended it became readily apparent that collectively prisoners were in a downhill spiral. We were suffering serious setbacks on the legislative, political, judicial and media fronts. Prisoners and their families were the people most affected by criminal justice policies, but we were also the ones almost entirely absent from the debate. There was also a lack of political consciousness and awareness among prisoners and widespread ignorance about the realities of the prison system among those not incarcerated.

Ed and I decided to republish *The Red Dragon* as a means of raising political consciousness among social prisoners in the U.S. We planned to model the new *Red Dragon* on the old one: a 50-60 page, Marxist quarterly magazine. We eventually put together a draft copy, but it was never printed for distribution. The main reason

was the lack of political and financial support on the outside. We lacked the money to print a big quarterly magazine, and we were unable to find volunteers outside prison willing to commit the time involved in laying out, printing and mailing a big magazine. In 1989 I was also subjected to a retaliatory transfer to the Penitentiary at Walla Walla, due to success in the WSR overcrowding litigation. Prison officials also wanted to ensure that the *Red Dragon* never got published. The transfer meant that Ed and I were relegated to communicating by heavily censored mail.

We scaled back our ambitions and instead decided to publish a small, monthly newsletter focusing on prison issues in Washington. If the support was there it would grow. Originally named *Prisoners' Legal News* we set out with the goal of publishing real, timely news that activist prisoners could use.

With the social movements that had traditionally supported the prison movement in this country at a low ebb (i.e., civil rights, women's liberation and anti-war movements), we saw *PLN's* objective as one that would emphasize prisoner organizing and self reliance. Like previous political journalists who had continued publishing during the dark times of the 1920s and 1950s, we saw *PLN's* role as being similar. From the outset *PLN* has striven to be an organizing tool as much as we are information source. When we started we had no idea that things would get as bad as they have gotten.

PUBLISHER  
Rollin Wright

EDITOR  
Paul Wright

CIRCULATION  
Fred Markham

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Linda Evans/Marilyn Buck  
Mumia Abu Jamal  
Walter Reaves

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Matthew Clarke, Mark Cook, Julia  
Lutsky, Dan Pens, James Quigley,  
Bob Williams, Mark Wilson, Willie  
Wisely & Ronald Young

### **PLN is a Monthly Magazine**

#### **Subscriptions**

A one year subscription is \$15 for prisoners, \$25 for individuals, more if you can afford it, and \$60 for lawyers and institutions. Prisoner donations of less than \$15 will be pro-rated at \$1.25/issue. Do not send less than \$7.50 at a time. New subscribers please allow six to eight weeks for the delivery of your first issue. Confirmation of receipt of donations cannot be made without an SASE unless you have not received your first issue within the time allotment mentioned above. Ad rates are available on request. *PLN* is a section 501 (c)(3) non-profit organization. Donations are tax deductible. Send contributions to:

**Prison Legal News  
PMB 148**

**2400 NW 80th Street  
Seattle WA 98117**

All foreign subscriptions are \$60 sent via airmail.

**Article submissions** may be made directly to the editor: **Paul Wright #930783, PO Box 881000, Steilacoom WA 98388**. Washington does not allow prisoners to correspond with other prisoners. Correspondence intended for *PLN*'s editor should not list prison names or numbers in the address if it is for *PLN*'s editor. We cannot return submissions without an SASE. If we use your article, you will receive a one year gift subscription to *PLN*.

*PLN* is online with a newly designed web site. Point your browser to <http://www.prisonlegalnews.org> to see the start of the *PLN* legal research site. If there are any questions or comments about the web page drop us a line or email him at [webmaster@prisonlegalnews.org](mailto:webmaster@prisonlegalnews.org).

## **History of PLN (cont.)**

In 1990 I was transferred to the Clallam Pay Corrections Center, a then new Washington prison. In May, 1990 the first issue of *PLN* appeared. Ed and I each typed up five pages of *PLN* in our respective cells. Columns were carefully laid out with blue pencils and graphics applied with a glue stick. We sent the proof copy to Richard Mote, a volunteer in Seattle, who copied and mailed it. Ed contributed *PLN*'s start up budget of \$50.

The first three issues of *PLN* were banned in all Washington prisons on spurious grounds. Ed was infracted by WSR officials for allegedly violating copyright laws for writing law articles. Officials at Clallam Bay ransacked my cell and confiscated my writing materials, background information and anything that was *PLN* related. Eventually Ed's infraction was dismissed and I received my materials back. Just as we were on the verge of filing a civil rights lawsuit challenging the censorship of *PLN*, the Washington DOC capitulated and allowed *PLN* into its prisons. Jim Blodgett, then the warden at the Penitentiary in Walla Walla, told me that *PLN* would never last because its politics were "harmless and outmoded," and prisoners were too young and immature to be influenced by our ideas. The reprisals had been fully expected, given prison officials' historic hostility to the concept of free speech.

The biggest disaster in *PLN*'s history then struck. Richard Mote turned out to be mentally unstable. He refused to print and mail *PLN*'s second issue because he took offense to an article by Ed calling for an end to the ostracization of sex offenders. Mote took off with all of *PLN*'s money that contributors had sent, about \$50, the master copy of the second issue and our mailing list. For several weeks it looked like there would be no second issue of *PLN*. Fortunately, we located a second volunteer, Janie Pulsifer, who was willing to print and mail *PLN*. Ed and I sent Janie a second copy of that issue of *PLN* which she copied and mailed. We were back on track.

### **The Presses Keep Rolling**

Ed's partner, Carey Catherine, had agreed to handle *PLN*'s finances and accounting, such as they were, after Mote

jumped ship. This was short-lived, because by August, 1990, she was preparing to go to China to study. The only person we knew who had a post office box who might be able to handle *PLN*'s mail, mainly to process donations, was my father, Rollin Wright.

He lives in Florida but generously agreed to handle *PLN*'s mail for what Ed and I thought would be a few months at most, until we found someone in Seattle to do it.

*PLN*'s support and circulation slowly began to grow. In January, 1991, *PLN* switched to desk top publishing. Ed and I would send our typed articles to Judy Bass and Carrie Roth, who would retype them and lay them out. Ed and I would then proof each issue before it was printed and mailed. In 1991 *PLN* also obtained 501(c)(3) status from the IRS in order for us to be able to use lower postage rates. *PLN*'s circulation had stabilized at around 300 subscribers. We purposely did not seek further growth at that point because we did not have the infrastructure to sustain it. Once we had non profit status and postal permits from the post office we were ready to grow.

In the summer of 1992 we did our first sample mailing to prison law libraries. Since *PLN*'s reader base had grown, and changed, we decided to reflect this change by renaming the magazine *Prison Legal News*, *PLN* wasn't just for prisoners anymore. *PLN* was now being photocopied and mailed each month by a group of volunteers in Seattle.

When *PLN* started out in 1990 Ed and I had decided *PLN* would be a magazine of struggle, whether in the courts or elsewhere, and everything would be chronicled. At a time when the prisoner movement was overcome by defeatism and demoralization we thought it important to report the struggles and the victories as they occurred, to let activists know theirs was not a solitary struggle.

A mainstay of *PLN*'s coverage from the beginning is the issue of prison slave labor. This is where the interests of prisoners and free world workers intersect at their most obvious. If people outside prison didn't think criminal justice policies affect them, *PLN* would make prisons relevant by showing how prison slave labor took their jobs and undermined their wages. This coverage was helped by the fact that Washington was, and remains, a

national leader in the exploitation of prison slave labor by private business. *PLN* has broken stories, later picked up by the national media, on how corporations like Boeing, Microsoft, Eddie Bauer, Planet Hollywood and U.S. congressman Jack Metcalf have all used prison slave labor to advance their interests. These stories were all picked up by other media, increasing *PLN*'s exposure.

In June, 1992, I was transferred back to WSR where Ed and I could collaborate on *PLN* in person for the first time since the magazine started. In 1991 I had been infracted by Clallam Bay prison officials for reporting in *PLN* the racist beatings of prisoners by gangs of white guards. Unable to generate attention for the beatings themselves, my punishment for reporting the attacks generated front page news in *The Seattle Times*. Eventually the disciplinary charges were dropped, but not until after I had spent a month in a control unit for reporting the abuses. The presses kept rolling.

### ***PLN* Becomes A Magazine**

On *PLN*'s third anniversary in May, 1993, we made the big leap. We switched to offset printing instead of photocopying and permanently expanded our size to 16 pages. *PLN* was no longer a newsletter, we were now a magazine. *PLN* had 600 subscribers.

In October, 1993, Ed was finally paroled after spending 18 years in prison. The state parole board, no doubt unhappy at *PLN*'s critical coverage of their activities, imposed a "no contact" order on Ed. This meant Ed could have no contact, by mail or phone, with me or any other felon. The parole board made it very clear that this was for the purpose of preventing Ed's involvement with *PLN*. If Ed were involved in publishing *PLN* in any way he would be thrown back in prison, very probably for the rest of his life.

The ACLU of Washington filed suit on our behalf to challenge the rule as violating Ed's right to free speech as well as my own. In an unpublished ruling, judge Robert Bryan in Tacoma dismissed our lawsuit, holding that it was permissible for the state to imprison someone for publishing a magazine while they were on parole. The Ninth circuit court of appeals would eventually dismiss our suit as moot when, after three years on state parole,

Ed was finally discharged from the parole board's custody. In the meantime, Ed got on with his life and has moved to California, where he is successfully employed in the computer industry.

In early 1994 Dan Pens became *PLN*'s new co-editor, replacing Ed. Dan had been a *PLN* supporter from the beginning, contributing articles, typing and maintaining *PLN*'s mailing list on a program he custom designed for *PLN*. (This was at a time when Washington prisoners could have computers in their cells.) *PLN* also switched to an East coast printer that offered significant savings over Seattle printers. This allowed *PLN* to expand to 20 pages. Within the year we were no longer being mailed by volunteers; our printer did the mailing as well.

In January, 1996, *PLN* hired its first staff person, Sandy Judd. *PLN*'s needs and circulation had grown to the point that volunteers were simply unable to do all the work that needed to be done. With some 1,600 subscribers, data entry, layout, accounting and other tasks all required full time attention. Dan had been moved to a different prison in the summer of 1995 and could no longer maintain the mailing list as he had before. For security reasons, we had not been comfortable with the idea of having the mailing list where prison officials could get it, but it had to be done in order to finish the computer program. The downside is that data entry takes a lot of time. By late 1997 Fred Markham was *PLN*'s overworked and underpaid office slave. Earlier this year we added Linda Novenski as our second staff person to help deal with the ever increasing work load.

This issue marks *PLN*'s tenth year and 120th issue of publishing. We have around 3,200 subscribers in all 50 states.

*PLN* goes into every medium and maximum security prison in the U.S. and many of the minimum security ones as well. *PLN*'s subscribers include prisoners, judges, lawyers, journalists, academics, prison and jail officials, activists and concerned citizens. The bulk of each issue of *PLN* is still written by prisoners. In 1999, the Washington DOC banned correspondence between prisoners. The resulting breakdown in communication made coordinating *PLN* difficult, to say the least, between Dan and me. Dan stepped down as co-editor but continues to contribute articles. In

addition to Dan and me, over the years we have added a number of contributing writers across the country who contribute articles and reporting to *PLN*. This includes, in no particular order: Willie Wisely, Alex Friedman, James Quigley, Matt Clarke, Mark Wilson, Julia Lutsky, Daniel Burton-Rose, Ronald Young, Mark Cook, Rick Card, Bob Williams, and others. We have three quarterly columns, by attorney John Midgley and political prisoners Linda Evans, Marilyn Buck and Mumia Abu-Jamal. For stories that require investigative follow-up *PLN* has been able to count on excellent investigative reports, like Ken Silverstein, Jennifer Vogel, Tara Herivel, Daniel Burton-Rose and others. This has helped *PLN* provide a wider spectrum of voices, deeper and better coverage of criminal justice issues and helped us expand in size without compromising our quality.

In 1998 Common Courage Press published our first book, *The Celling of America: An Inside Look at the U.S. Prison Industry*. Edited by Daniel Burton Rose, Dan Pens and me, the book is a *PLN* anthology. The book lays out in one place the reality and politics of the prison industrial complex. Now in its third printing, the book has received critical acclaim and helped boost *PLN*'s profile. Since 1998 I have been doing a weekly radio program on KPFA's Flashpoints program called "This Week Behind Bars." The show airs on Fridays and consists of news reports from *PLN* about what is happening in American prisons and jails.

*PLN* remains unique in many respects. First, *PLN* is the only independent, uncensored nationally circulated magazine edited and produced largely by prisoners anywhere in the U.S., if not the world. It is also the longest lived, if not in history, at least in recent memory. Second, *PLN* is one of the few publications that offers a class based analysis of the criminal justice system. No other publication has the depth and breadth of coverage of detention facility litigation as well as news that *PLN* does.

To date, *PLN* has remained self-reliant. Despite a lot of effort on our part, *PLN* has never been able to attract significant funding from foundations or similar sources. For the past ten years *PLN* has existed almost exclusively on donations sent by subscribers. In recent years advertising income has helped off-

## History of PLN (cont.)

set *PLN*'s costs as well. Book sales have also helped contribute to *PLN*'s continued existence. Until *PLN* had to hire a staff person we operated on a break-even basis. As late as 1995 we were giving away up to 48% of our subscriptions to prisoners who could not, or claimed they couldn't, afford to subscribe. With the expense of a staff person we had to dramatically limit the number of free subscriptions we provide. A free press doesn't come cheap.

Neither does free speech. From the very first issue to this day, *PLN* has been censored in prisons and jails across the country. In most cases we have been able to resolve censorship issues administratively. In cases where that was not possible, we filed suit and resolved the matter in court. The article following this article gives a rundown on *PLN*'s litigation history. Whether as a reflection of the times or a comment on *PLN*'s effectiveness, we are being faced with more attempts at censorship nationally than at anytime in the past ten years. *PLN* may well be the most censored publication in America.

### *PLN* In the Next Century

A question I have been asked is whether *PLN* is "successful." Success is a relative term. When a French journalist asked Mao Tse-Tung in the 1960's if he thought the French Revolution in 1789 had been successful Mao reportedly replied "It's too soon to tell." So too with *PLN*. The prison and jail population in the U.S. has doubled to two million people just in the time we have been publishing. By any objective standard, prison conditions, overcrowding and brutality are now far worse than at any time in the past 25 years. Draconian laws criminalize more behavior, impose harsher punishment in worse conditions of confinement than at any time in modern world history. With 5 percent of the world's population the U.S. has 25% of the world's prisoners. The legal rights of American prisoners are diminishing daily under coordinated attack from conservative courts and reactionary politicians. The corporate media and politicians alike thrive on a daily diet of sensationalized crime and

prisoner bashing, while prisons and jails consume ever increasing portions of the government budget, to the detriment of everything else.

*PLN* has duly chronicled each spiral in this downward cycle of repression and violence. We have provided a critique and analysis of the growth of the prison industrial complex and exposed the human rights abuses which are the daily reality of the American gulag at the turn of the century. In that sense, I believe *PLN* has been successful. Even if we didn't stop the evils of our time, at least we struggled against them and did the best we could under the circumstances. That we have managed to publish at all under these circumstances is a remarkable success. When I started *PLN* ten years ago I never thought I would be writing this retrospective ten years later in the same magazine.

But, not all is gloom and doom. *PLN* has helped stop some of the abuses that are legion in the American gulag. We have also borne witness to what is happening and duly documented it. Recent years have seen an increase in interest and support for prison issues and human rights in the United States. Many of *PLN*'s critiques of prison slave labor and other issues have been picked up and adopted by labor groups and even some elements of the corporate media.

I believe that ultimately *PLN*'s success will be measured by its usefulness to the prisoners, activists, journalists, lawyers and citizens who tried to make a difference for the better. We have tried our best to provide timely, accurate, useful information that people can use in their daily struggle for justice. *PLN* will also provide a useful, contemporaneous account of prison issues for later historians.

The main obstacles that *PLN* faces are those faced by all alternative media in the U.S.: underfunding and the corresponding inability to reach more people with our message. Absent relatively (for *PLN*) large scale funding from outside sources to do outreach work, this will continue to be a problem for the foreseeable future. The other primary problems *PLN* faces are prisoner illiteracy (depending on the state, between 40 to 80% of the prisoner population is functionally illiterate), and political apathy. Despite that situation, *PLN* has survived and grown. The need that led to *PLN*'s creation has only grown.

Corporate media coverage of prison and criminal justice issues tends to be abysmal. Most media coverage is little more than press release journalism. Input from prisoners or activists is rarely sought. Since its inception *PLN* has ensured that the voices of class conscious prisoners are heard. We are proud of the fact that over the years many stories originally broken or developed by *PLN* have been picked up by other news sources, including the corporate media. We are heartened by the fact that prisoners in other states are starting similar publications to deal with their local issues. This includes *Florida Prison Legal Perspectives*, *Voices Behind the Walls* and *Southland Prison News*, among others.

After a decade of publishing it has to be emphasized that *PLN* has always been very much a collective effort. Dan, Ed and I have been the editors, and the ones to hear the brunt of our captor's displeasure for speaking truth to power, but the reality is that *PLN* would never have been possible if it were not for the many volunteers and supporters who have so generously donated their time, energy, skills, labor, advice and money to *PLN*. The cause of prisoner and human rights has never been too popular in this country. In today's political climate it takes extraordinary courage and commitment to support a project like *PLN*.

.... The volunteers, without whose support *PLN* would not exist today, include, in no particular order: Dan Axtell, Dan Tenenbaum, Rollin Wright, Zuraya Wright, Allan Parmelee, Janie Pulsifer, Jim Smith, Jim McMahon, Scott Dione, Cathy Wiley, Ellen Spertus, Sandy Judd, Fred Markham, Bill Withrup, Wesley Duran, Janie Pulsifer, the late Michael Misrok, Shannon Hall and many others.

The lawyers that have advised and represented *PLN* on matters as diverse as Internet law and censorship litigation over the years include, in no particular order: Bob Cumbow, Mickey Gendler, Bob Kaplan, Joe Bringman, Leonard Schroeter, Dan Manville, Rhonda Brownstein and the Southern Poverty Law Center, the Washington ACLU, Alison Hardy, Marc Blackman, Frank Cuthbertson, Mike Kipling, Brian Barnard, Peter Schmidt, David Bowman and Sam Stiltner.

The organizations that have provided *PLN* with financial support over the years are: the Open Society Institute, Solidago Foundation, Resist, Southern Poverty Law Center, A Territory Resource, Sonya Staff Foundation and Youth Emergency Services.

Ultimately, the people who have contributed articles, donated money and subscribed are what have made *PLN* possible today. Without all these people contributing to *PLN*'s collective effort, and there are far too many to name here, we would have met the fate of the vast

majority of alternative publications: we would have folded within a year.

Going into the 21st century *PLN* will still be here, giving voice to the voiceless and providing the best news and analysis on prison and jail related issues around. ■

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## PLN in Court

by Paul Wright

Since *PLN* started in 1990 we have been censored in prisons and jails around the country. We have always attempted to resolve censorship issues administratively, but in cases where the goal was to keep *PLN* out of prison at any cost, that obviously wasn't possible. We have aggressively challenged censorship around the country and have won most of our battles. I would like to thank all the fantastic attorneys who have represented *PLN* in censorship litigation over the years. Thanks also go to those attorneys who volunteered to represent us in suits that we wound up not having to file after all. A brief summary of *PLN*'s closed cases are:

**WA Parole Suit:** In 1994 Ed Mead and Paul Wright sued the Washington Indeterminate Sentencing Review Board challenging their order that Ed have no contact with any felons for the purpose of publishing *PLN*. In an unpublished ruling, judge Robert Bryan of Tacoma upheld the ban. The case was dismissed as moot by the Ninth circuit when, after three years, Ed was discharged from ISRB supervision. The suit was sponsored by the ACLU of Washington. Frank Cuthbertson and Mike Kipling represented the plaintiffs. See: *Mead v. ISRB*.

**WA Bulk Mail Ban:** When Airway Heights Corrections Center opened in 1994 it banned all third and fourth class mail. In 1996 *PLN* subscribers Don Minikin and Don MacFarlane filed suit against the practice. In a published ruling, *Minikin v. Walter*, 978 F. Supp. 1356 (ED WA 1997) the ban was struck down as unconstitutional. In another, unpublished ruling, *MacFarlane v. Walter*, another judge also struck down the ban. Mickey Gendler represented Don Minikin on behalf of the WA ACLU. In addition to an injunction the court awarded attorney fees, costs and damages.

**UT Jail Publication Ban:** In 1995 a *PLN* subscriber was transferred to the Box Elder county jail in Utah, which banned all publications. *PLN* and another publisher filed suit challenging the ban. Soon after filing the jail settled, paying damages and attorney fees and changing their policy. Brian Barnard represented *PLN* in this suit. See: *Catalyst v. Box Elder County*.

**MI Book Ban:** In 1998 the Michigan DOC banned our book, *The Ceiling of America: An Inside Look at the U.S. Prison Industry*, from all of its prisons claiming the book incited violence. *PLN*, Common Courage press and two prisoners filed a class action suit challenging the ban. Michigan prison officials settled soon afterwards, paying damages, costs and attorney fees, removing the book from their banned book list and revamping their censorship procedure. The plaintiffs were represented by Dan Manville. See: *PLN v. Ransom*.

**WA Censorship Litigation:** In 1997 *PLN* filed suit, with other plaintiffs, challenging a Washington DOC ban on third class mail, gift subscriptions, bans on magazine articles, photocopies and court rulings, limits on newspaper articles, etc. In early 2000, the WA DOC settled the suit by changing its mail censorship policies and paying attorney fees and costs for the plaintiffs. The suit was sponsored by the ACLU of Washington. The plaintiffs were represented by Mickey Gendler and Joe Bringman. See: *Humanists of Washington v. Lehman*.

The following lawsuits are still pending as we go to press:

**UT Bulk Mail Suit:** In 1997 the Utah DOC attempted to ban third class mail. *PLN* sued and the ban was quickly rescinded with an agreement to settle. The case is still pending as the parties await a ruling to obtain guidance on administra-

tive exhaustion for Utah prisoners under the PLRA. *PLN* is represented by Brian Barnard. See: *PLN v. Haun*.

**UT Jail Bulk Mail Ban:** In 1998 the San Juan county jail in Utah refused to deliver *PLN* to a jail prisoner subscriber because it was sent third class mail. *PLN* filed suit challenging the rule. The case is in discovery. *PLN* is represented by Brian Barnard. See: *PLN v. San Juan County*.

**OR Bulk Mail Ban:** Since 1991 the Oregon DOC has banned third class mail from its prisons. In 1998 *PLN* filed suit challenging the ban. We lost in the district court and the case is currently on appeal to the Ninth circuit. *PLN* was represented in the district court by Alison Hardy and Marc Blackman. On appeal it is represented by Sam Stiltner. See: *PLN v. Cook*.

**AL Gift Subscriptions:** The Alabama DOC prohibits its prisoners from getting gift subscriptions to publications. Prisoners are forced to buy subscriptions from their prison trust accounts. *PLN* filed suit in 1999 challenging the practice. The case is currently awaiting a decision on the party's cross motions for summary judgment. *PLN* is represented by Rhonda Brownstein and Catherine Smith of the Southern Poverty Law Center. See: *PLN v. Haley*.

**WA Nazi Guard Censorship:** The May, 1999, issue of *PLN* was censored in all Washington prisons because it contained an investigative expose of Nazi and white supremacist guards employed by the Washington DOC. *PLN* filed suit in late 1999 and the district court dismissed the case soon afterwards. The case is currently on appeal to the Ninth circuit. *PLN* is represented by Frank Cuthbertson. See: *PLN v. Lehman*.

**Public Disclosure:** In the course of investigating stories I frequently file PDA requests with various state agencies. The

## PLN in Court (cont.)

Washington DOC has a long record of refusing to comply with state disclosure laws in its attempts to cover up its misfeasance and misconduct. After being denied documents relating to staff misconduct and prison industries *PLN* filed

suit. The case is pending in Thurston county superior court. *PLN* is represented by David Bowman. See: *PLN v. Washington DOC*.

*PLN* has no litigation budget. We rely on counsel willing to represent us on contingency or pro bono. The cases we filed directly impact the free speech rights

of *PLN* and our subscribers. In most cases we are attacking broader censorship practices that have a wider impact beyond the immediate parties to the suit. We report the filing and conclusion of our lawsuits in *PLN*. Unfortunately, we have more in the works. ■

## From the Editor

by Paul Wright

This issue celebrates *PLN*'s tenth anniversary. One thing about *PLN* is that we have pretty much muddled along and done the best we could. To this day, no one involved in *PLN*'s daily operations has any professional experience in journalism or publishing. We're all self taught and learned as we went. In any event, I'm glad *PLN* has lasted as long as it has. I hope we are able to bring you another ten years of *PLN*.

In responding to our reader survey, a large number of people indicated that they would like to see more information about habeas corpus litigation in *PLN*. Therefore, starting with this issue we will be running a quarterly column by Texas attorney Walter Reaves called "Post Conviction Update." This column will report significant court rulings pertaining to post conviction relief.

Beginning with the July issue we will also be running a quarterly column by California attorney Kent Russell dealing with procedural issues in fed-

eral habeas corpus litigation. We would like to welcome these two new columnists, and we hope that their contributions will help us to better serve our readers.

As always, your financial support is critical to *PLN*'s future survival. If you haven't made a donation to *PLN*'s matching grant campaign, please do so and encourage others to give as well.

Prisoners should note that we are belatedly increasing our prisoner subscription rates to reflect the rise in *PLN*'s printing and postage costs. We delayed raising the prisoner rate as long as we could. We are giving ample notice for all those who wish to subscribe, renew or extend their subscription at the current rates can do so.

This editorial is brief as I am being moved to a different prison shortly. If I am on your mailing list or you send me things, correspond, etc., please note that my current, correct address is on page two of this issue of *PLN*.

Enjoy this issue of *PLN* and please encourage others to subscribe. ■

## Beating Lawsuit Dismissal Reversed

The court of appeals for the Second circuit held that a district court erred in dismissing a prisoner's claim that he was beaten by prison guards. The court affirmed dismissal of the plaintiff's wrongful prosecution claims.

Brevard Griffin, a New York state prisoner, filed suit claiming that he was beaten by prison guards while handcuffed and suffered a bruised shin and swollen knee as a result. Griffin also claimed that he was wrongly prosecuted for assaulting the guards who beat him. Griffin pleaded guilty to the assault charges in state court. The district court dismissed Griffin's lawsuit.

In a brief ruling, the appeals court noted that while Griffin's excessive force claim was "weak and his evidence extremely thin," it should not have been dismissed because material issues of fact were in dispute as to whether or not the guard defendants had used excessive force against him.

The court also noted that minor injuries do not preclude excessive force claims. This claim was remanded for further proceedings. The court upheld dismissal of the wrongful prosecution claim because Griffin had pled guilty to the assault charges. See: *Griffin v. Crippen*, 193 F.3d 89 (2nd Cir. 1999). ■

## CORRECTION

*PLN* regrets that the incorrect version of "Two Die in Latest Angola Escape Attempt" was published in the April 2000 *PLN*. The version published incorrectly stated that "none of the above cited incidents have been reported by the award-winning prison magazine, *The Angolite*."

The article should have stated that few of the incidents were covered. [The November death row escape was reported at length in the Nov/Dec 99 *Angolite*.]"

## \$880,000 In GA Medical Neglect Suit

On February 27, 1999, a Baldwin county superior court jury in Georgia awarded prisoner Stephanie Stitt \$600,000 in damages in a medical neglect suit against Correctional Medical Systems (CMS). Stitt fell and injured her back while playing volleyball at the Baldwin State Prison. The Georgia Department of Corrections has contracted its medical care out to CMS. Stitt repeatedly sought medical attention which was denied and delayed. As a result, Stitt suffered a herniated disk that left her with no bowel or bladder control. Stitt now requires daily catheterization and the use of adult diapers.

Stitt filed suit claiming she was denied adequate medical care. The Georgia DOC settled with Stitt for \$280,000 before trial. CMS went to trial and the jury awarded Stitt \$600,000 in damages against CMS. CMS's defense was that they were providing medical care as practiced in prisons. CMS has appealed the verdict. See: *Stitt v. Correctional Medical Systems*, Baldwin County Superior Court, Case No. 96-CV-32768-E. ■

Source: *Georgia Trial Reporter*

# Colorado Denies Hepatitis C Treatment as Too Expensive

by Bob Williams

While much attention has been paid lately to denying AIDS/HIV treatment as being too expensive for prisoners, little focus has been aimed at those restricting or denying treatment for prisoner's infected with the hepatitis C virus.

Hepatitis is spreading in institutions across this country at a rate far greater than John Q. Public is aware. Hepatitis C infections, also called non-A, non-B hepatitis, may not truly be on the rise but their detections are increasing. New tests, and more widely spread testing, is revealing an alarming amount of prisoners infected with this potentially deadly virus.

The standard treatment for hepatitis C infections is a two-phase treatment. In phase I, the patient is given shots of a protein-based derivative known as Interferon, three times per week for six months to a year. Interferon is also a naturally occurring substance in the body. Only about 15% of patients respond to Interferon treatment. Phase II, if needed, stacks the Interferon shots with Ribavirin, an antiviral drug. Approximately 45% of patients respond to this combination therapy.

While this treatment regimen seems straightforward enough, it becomes difficult when the patient is a prisoner. First, proper detection requires a blood test for elevated liver enzymes to initially identify potential infections. Once identified, a liver biopsy is required to verify an actual infection and to determine the extent of the liver's damage. Finally, the prisoner must actually receive the necessary treatment.

In Colorado, increased medical awareness has brought increased testing for hepatitis C; but, in most instances, it is still up to the prisoner to request the test unless elevated enzyme levels are noticed during initial screening upon intake. Once a blood test is considered positive for hepatitis C, the Colorado Department of Corrections (CDOC) slams on the brakes.

First, the prisoner is forced to sign a contract before any further action is taken. Second, the contract mandates that if the prisoner has not already at-

tended "classes and activities (including AA and NA)" for at least a year, he or she will be required to do so for a full year before even the liver biopsy verification and damage assessment is performed. In the meantime, the hepatitis C infection is running unchecked in the prisoner's body. Finally, when and if treatment begins, if the prisoner skips meetings his or her treatments "will be stopped and not restarted." This statement is echoed throughout the contract. As if life isn't hard enough behind bars.

Untreated, the hepatitis C virus can lead to cirrhosis, liver failure, and liver cancer. It is the leading cause of liver transplantation. Hepatitis C often does not cause symptoms such as high liver enzymes, acute fatigue, aching joints, and eye disorders until years after infection.

It's all a questions of economics say most prisoners. While this is often stated by medical staff as the reason for withholding treatment, officials are reluctant to document this reasoning in the grievance process. This failure to document the CDOC's reasons for treatment failure seriously impedes further action and attempts for judicial relief. But the treatment contract plainly states that "treatment for hepatitis C is expensive" and then states in bold print that the "CDOC does not believe that treatment should be given to patients who are likely to become reinfected."

The CDOC automatically presumes, as stated in the treatment contract, that all infected prisoners were infected by the "sharing of needles and syringes among intravenous drug abusers, sharing of straws among nasal cocaine users, and from tattoos and body piercing using contaminated equipment." This ignores that fact that some individuals may be infected for many years before detection. This infection could have come from blood transfusions before improved blood donor testing (circa 1992), from working in the medical field, kidney dialysis, hemophiliacs, people who've had manicures with contaminated equipment, or from an incongruous

lifestyle long since abandoned. One can easily see that even contracting hepatitis C through tattoos, body piercing, or a simple manicure will require a year of AA or NA treatments. Published reports state that "about 40% of people infected with hepatitis C do not appear to belong to any of the above risk groups."

Anyone needing more information on hepatitis C can find numerous sources readily available. A good starting point for those who have access to the internet (or access through someone else) log on to: [www.hepc-connection.org](http://www.hepc-connection.org) or search for The Hepatitis Place or the American Liver Foundation on the web.

You can also call the Hep C Connection toll free at 1-800-522-HEPC. ■

Sources: CDOC treatment contract, The Hepatitis Place, the Hep C Connection, and the American Liver Foundation.

## Secret Tools for Post-Conviction Relief, 1999

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# Washington Civil Commitment Held in Contempt

by Ron Petersen and Tamara Menteer

On November 15, 1999, after 6 years overseeing an injunction, a federal judge issued a ruling finding the Washington state civil commitment facility known as The Special Commitment Center (SCC), the nation's first civil commitment program designed to re-incarcerate sex offenders beyond the lengths of their original sentences, in contempt of court.

In Judge William L. Dwyer's ruling (*Turay v. Seling*, C91-664WD, *Sharp v. Weston*, C94-121WD, and *Pedersen v. Hill*, C94-211WD, *Hall v. Quasim*, C95-1111WD, and *Petersen v. Dehmer*, C96-415WD) he stated, "These basic treatment requirements were ordered long ago; the continued failure to achieve full compliance is unexcused." Judge Dwyer ordered the defendants, Mark Seling, Ph.D., Superintendent, and Vincent Gollogly, Ph.D., acting Clinical Director, to put into place what was ordered in 1994. If the defendants fail to do so, they will be fined \$50 per resident, per day, beginning May 1, 1999. The current population of the SCC is 98 residents. The fines will go directly to the court where Judge Dwyer will administer the money to the residents.

Washington's Attorney General, Christine O. Gregoire, has appealed the contempt order to the Ninth Circuit Court of Appeals. In the judge's Finding of Fact he said, "The defendants have fallen into a pattern of first denying that anything is amiss at SCC, then engaging in a flurry of activity to make improvements before the next court hearing, then admitting at the hearing that shortfalls of constitutional magnitude still exist, then returning to denial." The Plaintiffs are here again forced to deal with the Defendants' denial in the form of appeal.

The residents of the SCC have gained little ground since the ruling of November 15, 1999. Several employee changes have resulted in a complete breakdown of the grievance and abuse policies. It is important to note the SCC is located wholly within a DOC prison facility and is entirely dependent upon DOC for all services. Commissary orders from the prison store have all but

stopped since the contempt order was issued. Requests to transfer funds from resident accounts for the purpose of paying bills or purchases have come to a standstill.

Many residents view these tactics as retaliation for fighting the program in courts. The Attorney General of Washington has been instructing the defendants regarding what residents are entitled to, and that position has always been far below minimum standards. The majority of residents now believe that the civil commitment law that has incarcerated them, RCW 71.09, has only one purpose and that is to imprison them for the rest of their natural lives. In the years of operation the civil committees that have been released from SCC have done so through litigation. The SCC has yet to "cure" anyone.

Less than a week after the ruling, Washington's Governor, Gary Locke, promised the SCC a fast \$18 million in an attempt to thwart a possible collapse of the program. Perhaps when Washington taxpayers find themselves paying 100 sex offenders \$5000 per day to stay in prison, the irony of the issue could sink in – we will see, come May 1, 2000.

There is one additional factor that is yet to show up on the balance sheet – at least five more lawsuits are pending against the SCC. Judge Dwyer has not lost this point, and even reminded the state, "The importance of injunction compliance in these cases is underscored by two Washington Supreme Court decisions filed on October 21, 1999, *In Re Detention of Turay*, (139 Wn2d, p.379) and *Campbell v. Washington*, (139 Wn2d, p.341)."

Dwyer also noted *Young v. Weston* (Vol. 192, Fd. Rep.3, p. 9715-amended ruling of 9<sup>th</sup> Circuit, Sept. 16, 1999, and Vol 176, Fd. Rep. 3, Case 1196, original ruling), raises the question whether the conditions of confinement are punitive for purposes of ex post facto and double jeopardy analysis, stating, "...the present injunction proceedings are important not just in their own right but to the above-

cited cases and to others brought by SCC residents in state and federal courts."

In his ruling, Judge Dwyer pointedly commented that the state did not have to create this law, but since it had done so, it would need to be fairly implemented. He noted that in order to come into full compliance, the program would need to develop bona fide release mechanisms, which would necessitate halfway houses and a systematic program for Less Restrictive Alternative sentences. He reprimanded the program, stating, "With nearly a hundred men in confinement, such a long delay is unacceptable in view of the time already allowed," and, "The record in these cases shows footdragging which has continued for an unconscionable time."

Although the state is given wide latitude in determining what is constitutionally adequate treatment per the U.S. Supreme Court *Hendricks* (521 U.S. at 368 n.4) ruling on this form of civil commitment, Judge Dwyer cited *Youngberg* (457 U.S. at 323 {1982}) in justifying that such decisions cannot depart from accepted professional judgement, practice or standards. He noted, "[T]he Defendants have departed so substantially from professional minimum standards as to demonstrate that their decisions and practices were not and are not based on their professional judgement."

Look for future articles regarding sexual offender civil commitment written by Whitestone Foundation in upcoming issues of PLN. Whitestone Foundation is a nonprofit organization with the mission to provide a forum for critical analysis of such civil commitment schemes as they unfold throughout the U.S. Subscription to the monthly newsletter can be obtained for the cost of \$10.00 per year by writing to Whitestone at PO Box 1138, Bothell, and WA 98041-1138. Sorry – stamps in trade for subscriptions are not accepted. ■

[Note: In 1998 DSHS paid 16 sex offenders at the CCC \$10,000 each to settle their lawsuit for not receiving treatment while confined there. They were awarded some \$260,000 in attorney fees as well.]

# New Mexico Private and State Prison Phone Rates Challenged

Holobird

Two separate state court class action lawsuits have challenged the excessive phone rates charged to people who accept collect calls from New Mexico state prisoners. The first lawsuit, *Valdez v. Wackenhut Corrections Corporation*, was filed on December 30, 1999, in Rio Arriba district court. The plaintiffs have family members imprisoned in private prisons or jails run by Wackenhut, Corrections Corporation of America (CCA), Cornell Corrections and Correctional Services Corporation (CSC). Private prisons hold about 30% of all state prisoners in New Mexico and numerous jail detainees. The defendants in the suit include the private prison companies and their employees. The phone service provider defendants are Evercom Systems, Inc. and PCS America, Inc.

The plaintiffs claim that the private prison companies have exclusive contracts whereby prisoners can only place collect calls using the services of the phone service provider defendants, who in turn pay hefty kickbacks to the prison companies in exchange for the contracts. This arrangement prevents the use of competitive services or lower rates by either the prisoner or the people who accept collect calls from them.

The plaintiffs claim that these exclusive contracts and the resulting kickbacks violate the New Mexico Unfair Practices Act, NMSA 1978, § 57-12-1, et seq., as they constitute unfair, deceptive and unconscionable trade practices. Plaintiffs also claim violation of the New Mexico anti trust act, unjust enrichment, constructive fraud, economic compulsion and racketeering. As relief the plaintiffs seek compensatory, punitive and treble damages to the plaintiff class, injunctive relief and attorney fees and costs.

The second class action lawsuit, *Valdez v. State of New Mexico*, was filed in Rio Arriba district on January 14, 2000, on behalf of people who accept collect calls from prisoners incarcerated in prisons operated by the state of New Mexico and various county jails in that state. The plaintiffs all have family members in New Mexico state operated prisons. The defendants are: the state of New Mexico, its Department of Corrections, DOC sec-

retary Robert Perry, and the counties of: Bernalillo, Chaves, Colfax, Curry, Grant, Guadalupe, Lea, Luna, Los Alamos, Otero, Quay, Rio Arriba, Roosevelt, San Juan, San Miguel, Sandoval, Taos and City of Espanola. The phone service provider defendants are: US West Inc., AT&T Communications, PCS America Inc., Evercom Systems Inc., Gateway Technologies Inc., Public Communications Services Inc., Silverado Communications Inc., Security Telecom Corp., T-Netics, RC and A, Ameritel Communications Inc., Invision Telecom Inc., MOG Communications Inc. and Mcleod USA Telecommunications Service Inc.

The plaintiffs claim that New Mexico prisoners are forced to use collect call service providers selected by the state and counties and in turn receive hefty kickbacks from the phone service provider defendants. As a result, the charges imposed on people who accept such calls are much higher than they otherwise would be. The plaintiffs claim this constitutes an unfair and unconscionable trade practice under NMSA 1978 § 57-12-1 et seq., violates the New Mexico Anti Trust Act, NMSA 57-1-1 and constitutes unjust enrichment and constructive trust, economic compulsion, constructive fraud, illegality, violates the separation of powers doctrine and constitutes an unlawful taking in violation of the New Mexico constitution.

As relief, the plaintiffs seek compensatory, punitive and treble damages, class certification, attorney fees and costs and injunctive relief. See: *Valdez v. Wackenhut Corrections Corp.*, Case No. D-0117-CV9903656 and *Valdez v. State of New Mexico*, Case No. D-0117-CV-200000104, Rio Arriba County, 1st Judicial District Court.

In the August, 1999, issue of *PLN* we reported the filing of federal anti trust suits challenging excessive prison and jail phone rates in Illinois, Kentucky and Missouri. Since then similar lawsuits have been filed challenging prison phone rates in New York and Ohio, but *PLN* has not yet obtained copies of the complaints. We will report developments in these cases as they occur. ■

# Five Lawyers in Peru Freed

by *Heriberto Ocasio*

Lima, Peru—

There is good news in the struggle to defend the Peruvian lawyers who are under attack from the U.S.-backed Fujimori regime for their courageous work in defending political prisoners. A trial for six of the defense lawyers ended in acquittal. On September 20, five of the lawyers - Luis Ramón Landaure, Magno Mariñas Abanto, Rodolfo Ascencios Martel, Carlos Gamero Quispe, and Ernesto Messa Delgado - were freed and walked out of the gates of the Miguel Castro Castro maximum security prison after being locked up for almost two years.

These lawyers remain unrepentant in the face of the fascist repression of the Fujimori regime. Upon their release, the five lawyers immediately issued a statement promising to continue to defend all who need their services.

Eight defense lawyers were originally arrested in 1997—all victims of frame-ups and sham trials. They were hit with blatantly political charges of “treason” and “terrorism” which carry heavy prison sentences. These lawyers have long records of defending people accused of “terrorism,” poor people from the shantytowns, and others under attack by the government. For this “crime,” these lawyers became targets of government persecution. As the lawyers themselves said: “The real reason for our detention is to impede the right to defense and the freedom to carry out our profession, in this way no lawyer would dare to freely defend a person under investigation for terrorism for fear of being detained or implicated.” [*PLN*, March 1998]

As word of their arrests filtered out of Peru, people in various countries began to mobilize in protest, demanding that the courageous people’s defenders be freed. Lawyers and others in Mexico, Colombia, Greece, and the U.S. sent statements to the Interamerican Commission on Human Rights (IACHR), and to Peruvian officials and newspapers. There was much outrage

that the Peruvian lawyers were being jailed for simply carrying out their work. The statements expressed anger and concern that the lawyers were being held under harsh prison conditions and denied their basic legal rights. Many thousands of political prisoners are locked up under inhumane conditions in Peru’s dungeons. The eight lawyers became political prisoners themselves, joining numerous other lawyers already behind bars—many serving life sentences—for their defense of people charged with political crimes.

On September 13, the trial on “terrorism” charges began for six lawyers. (Two of the lawyers were released earlier.) This trial was whited out in the U.S. press. But some trial news was reported by the media inside Peru. According to these reports, the prosecution accused the lawyers of association with the Communist Party of Peru (PCP). The prosecution’s only “evidence” was that the lawyers defended political prisoners, including people accused of being PCP members. Some of the lawyers were accused of having met to discuss legal strategy in the defense of PCP Chairman Abimael Guzmán. Luis Ramón Landaure was said to have carried a red flag inscribed with a hammer and sickle in a 1987 demonstration. Another piece of “evidence” was the possession of a book by Mao Tsetung.

All of this “evidence” was based on the testimony given by two “arrepentidos.” (“Arrepentidos” are people who themselves are charged with political crimes, but who give testimony against others. The 1993 Law of Repentance offered such people pardons or lenience for themselves or their relatives in return for their testimony.)

Even before this trial, the lawyers faced a totally rigged legal process. For example, one prosecutor had to issue a finding admitting that the charges wouldn’t stand up and recommending that the lawyers be freed—but higher authorities stepped in and ordered the railroad to push ahead. Two of the law-

yers managed to get freed before this happened. But a special court set up for terrorism” cases overruled this prosecutor and ordered the remaining six lawyers to go on trial.

At the weeklong trial, the six lawyers were defended by a team of Lima lawyers and representatives of the Lima Bar Association. At the end, the court was unable to convict them and was forced to rule that the lawyers be acquitted and released—after they had spent 22 months in jail.

This acquittal is a victory, but the repression against lawyers in Peru continues. Many others still remain in prison. And in February, 2000, the regime arrested yet another well-known lawyer, Roberto Godofredo Sihuy Soto, charging him with “terrorism” and “treason.”

And this is also not the end of the cases of the lawyers who were acquitted. The sixth acquitted lawyer, Estéban Suárez González, was not immediately released, supposedly due to a bureaucratic foul-up over an arrest warrant. He remains in prison. The prosecutor announced he will appeal the acquittal of Rodolfo Ascencios Martel. Carlos Gamero Quispe and Ernesto Messa Delgado are free now, but both men face new charges: prosecutors now claim that the two lawyers bribed a cop to get a copy of testimony against them. And in all of the cases, the verdicts will now be reviewed by a higher court—at which point there is no guarantee against new legal twists and tricks.

So the struggle needs to continue against the ongoing repression of the people’s lawyers in Peru. The Fujimori regime is determined to make it impossible for people charged with political crimes to have access to lawyers and legal defense. And there is the overall situation of the thousands of political prisoners locked up in Peru’s dungeons under conditions that completely go against all international

standards, including those set by international human rights law.

The broad international mobilization was very important. There were many expressions of protest and support from lawyers, legal organizations, and law students in different countries. Shortly before the trial, a delegation of French lawyers visited the imprisoned lawyers and spoke to the Peruvian press to denounce the repression of lawyers. More lawyers came from Colombia and France, representing the group "Lawyers Without Borders," to observe the trial itself. This international support was heartening to the Peruvian lawyers and their supporters. It made the Fujimori

regime's plans much more difficult to complete.

The fight to defend the people's lawyers has been taking place in the context of the situation in Peru where the regime—with full U.S. backing—is trying to brutally crush the People's War led by the PCP and to stifle all resistance. But the impoverishment and suffering of the Peruvian people is intensifying, adding more fuel to the continuation and development of the People's War. In the face of difficulties, the PCP is persevering in leading a just and righteous revolutionary war of the masses. The People's War remains the core problem faced by the present rul-

ing regime. This is the central motivation behind all the repression and brutality the regime commits.

The release of the five lawyers does not mark any fundamental change in how the regime operates. But it is a real victory for the people. The fact that these lawyers stood strong, were strongly supported, and are now freed, gives encouragement to progressive and revolutionary forces in Peru and those supporting them, in Peru and around the world. ■

*[For more information about events in Peru, contact: CSRP, PO Box 1246, Berkeley, CA 94701.]*

## \$150,000 Judgment Against Prison Officials Upheld

A federal district court in New York upheld a \$150,000 jury verdict against prison officials, concluding that the award was not excessive. The court also held, in a separate ruling, that the Prison Litigation Reform Act, (PLRA), cap on attorney's fees does not apply to claims brought under the Americans with Disabilities Act (ADA).

Easton Beckford, who has been confined to a wheelchair since 1984, brought suit against New York state prison officials. Beckford alleged violations of the Eighth Amendment and the ADA for, among other things, depriving him of his wheelchair for extended periods of time, between January 1994 and May 1995.

After a 10 day trial, the jury found in Beckford's favor on two of his claims. First, that prison officials were deliberately indifferent to his serious medical needs, in violation of the Eighth Amendment. Second, that New York violated Beckford's rights under the ADA in various ways.

The jury found against two of the three named defendants on Beckford's Eighth Amendment claim. "Without awarding compensatory or nominal damages," the jury awarded punitive damages totaling \$15,000 against one defendant and \$10,000 against the other. The jury also awarded Beckford

\$125,000 in compensatory damages against New York for the ADA violation, for a total verdict of \$150,000.

Prison officials moved to set aside the jury verdict, arguing: that the punitive damage awards were improper because the jury failed to grant compensatory or nominal damages; and that both the Eighth Amendment and ADA awards were excessive.

With respect to the punitive damage awards, the court first observed that when a jury erroneously awards punitive damages without first awarding compensatory damages, the court may award nominal damages. Accordingly, the court awarded Beckford nominal damages in the amount of \$1.00 against each of the defendants that punitive damages had been awarded against. The court also concluded that award was clearly supported by the evidence.

The court also held that the compensatory damage award for the ADA violation was not excessive, because it "clearly falls under the statutory ceiling" of \$300,000 and it was substantially less than "awards granted by other juries under the ADA...." See: *Beckford v. Irvin*, 49 F.Supp.2d 170 (WD NY 1999).

Additionally, in an unpublished Order awarding Beckford attorney's fees in the amount of \$50,898.56, the

court held that the PLRA cap on attorney's fees does not apply to cases where the award is authorized under a statute other than 42 U.S.C. § 1988. Accordingly, the court concluded that the PLRA's attorney's fee cap applied to Beckford's Eighth Amendment claim but not to his ADA claim.

Noting that Beckford's attorneys affirmed "that they spent equal amounts of time on both claims, and that the claims were inextricably intertwined," the court found that it was "appropriate to apportion one-half of the attorneys' time to the ADA claim and the other half of the attorneys' time to the § 1983 claim."

As such, one-half of their time was billed at the normal hourly rate, and the other half was billed at the rate required by the PLRA attorney's fee cap.

Finally, the court noted that the PLRA requires that up to 25 percent of a prisoner's judgment be applied to satisfy an attorney's fee award against the defendant. The court then held that since only \$25,000 of the \$150,000 judgment was awarded under Beckford's § 1983 claim, only \$6,520 - 25 percent of \$25,000 - of the judgment was to be applied to satisfy a portion of the attorneys' fees with the remaining \$44,648.56 to be paid by defendants. See: *Beckford v. Irvin*, 60 F.Supp.2d 85 (WDNY 1999). ■

# Post Conviction Update

by Walter M. Reaves, Jr.

This column will address recent decisions which have some impact on post-conviction procedure. The summary is by no means exhaustive, and contains only those decisions which may have some potential impact on defendants pursuing to post-conviction claims. For the most part, the decisions are from the federal courts. In some cases, exceptionally significant state court decisions will be summarized.

## Limits on Pro se Representation

The Supreme Court recently decided an important case which will be of interest to most inmates. Most everyone has assumed that a defendant has the right to represent themselves on appeal, just as they do at trial. The right to *pro se* representation at trial was recognized in *Faretta v. California* 422 U.S. 806, 95 S.Ct. 2525 (1975) the failure to comply with a timely request before trial generally constitutes structural type error, which will warrant relief. Addressing the same issue in the context of a direct appeal, the Court in *Martinez v. State*, No. 98-7809, U.S. \_\_\_, 120 S.Ct. 684 (1/12/00), held a defendant does not have the right to represent themselves. Therefore, defendant's can be forced to proceed with appointed counsel.

## Habeas Corpus

The Ninth circuit recently addressed what rights can be raised by federal prisoners in a habeas corpus petition in *United States v. Valdez*, 195 F.3d 544 (9th Cir. 1999). The court addressed the one-year limitation which starts when the right asserted is initially recognized by the Supreme Court. The court held the right in question need not be a constitutional one, which benefitted the defendant in this case because he was relying on the holding in *Bailey v. United States*. The court also held that if the Supreme Court subsequently declares a right retroactive, the date of that decision is the controlling one.

Another significant decision is *Johnson v. United States*, 196 F.3d 802 (7th Cir. 1999). The question there was whether an amendment to a timely filed writ was a successive writ. The court held

a defendant should be allowed one full opportunity to seek review. Therefore, the defendant should be allowed to amend a petition any time before a decision is rendered. Such amendments should be allowed even if a response has been filed.

The second circuit considered the issue of timely filing in *Bennet v. Artuz*, 199 F.3d 116 (2nd Cir. 1999). The issue before the court was whether a state court application that was procedurally barred tolled the limitations period. The court held a state court petition is properly filed when it is submitted in accordance with general procedural requirements. Thus, limitations is tolled from the time the petition is filed, until finally disposed, even if subsequently dismissed on procedural grounds. The Fifth Circuit reached the same result in *Villegas v. Johnson*, 184 F.3d 467 (5th Cir. 1999). There, the Court held a state petition was "properly filed" even though it was subsequently dismissed on procedural grounds. Reaching the opposite result is the Ninth Circuit, in *Dictado v. Ducharme*, 189 F.3d 889 (9th Cir. 1999).

In another significant decision on tolling, the Fifth Circuit held in *Ott v. Johnson*, 192 F.3d 510 (5th Cir. 1999) that limitations is not tolled during the time a state defendant could have sought Supreme Court review, where such review is not actually sought. Thus, if a petition for writ of certiorari is not filed, the limitation period will run from the Court of Appeals judgment.

Habeas relief was granted in *Dubria v. Smith*, 197 F.3d 390 (9th Cir. 1999). The trial court refused to redact information in a pre-arrest interview concerning the officer's opinion of the defendant's guilt. During the interview the officer repeatedly stated that he had no doubt about the defendant's guilt, and that no one would believe the defendant's story. During final argument, the prosecutor argued without objection that the defendant was a liar, was garbage, and suggested there was evidence which would support his guilt. Considering both those errors together, the Court concluded the defendant did not receive a fair trial.

Habeas relief was also granted in *Spicer v. Roxbury Correctional Institute*, 194 F.3d 547 (4th Cir. 1999). An eyewitness

who testified in exchange for leniency had initially told his attorney that he did not see anything. That fact was not disclosed to the defense, which the Court found was a *Brady* violation. The Court also found the State Court decision was contrary to, or involved an unreasonable application of clearly established federal law, and granted relief. The reason for that decision is probably because the State Court indicated that relief could be granted only if the undisclosed material was exculpatory, and not merely impeachment material.

Another successful habeas case is *Newman v. Hopkins*, 192 F.3d 1132 (8th Cir. 1999). The victim of a sexual assault testified her attacker spoke with a Hispanic accent. The defendant attempted to introduce a voice exemplar to prove he had no accent, but the trial court would not let him do so unless he submitted to cross-examination. The Court found that was error, and also found it was an unreasonable application of federal law. The Court then went on to apply a harmless error analysis since that had not been done by the State Courts, and granted relief. (Note: most circuits do not apply the *Chapman* harmless error analysis, but instead use the more stringent test set forth in *Brecht v. Abrahamson*, 507 U.S. 619, 113 S.Ct. 1710 (1999). The Sixth Circuit recently reaffirmed that approach in *Gilliam v. Mitchell*, 179 F.3d 990 (6th Cir. 1999).)

The Eighth Circuit adopted a somewhat expansive standard of review under the A.E.D.P.A. in *Long v. Humphrey*, 184 F.3d 758 (8th Cir. 1999). In construing the unreasonable application prong of the statute, the court held that relief can be granted if the state court decision "evaluated objectively and on the merits, resulted in an outcome that cannot be reasonably justified under existing Supreme Court precedent." This standard is different from many circuits, such as the Fifth Circuit, which apply a more subjective test. Under the test in the Eighth Circuit, the decision will be evaluated on the merits, and if it does not appear to be reasonable, then relief can be granted. This issue is currently before the Supreme Court, and a decision should be coming down this year.

The defendant in *Smalls v. Batista*, 191 F.3d 272 (2nd Cir. 1999) was able to obtain relief in a habeas action because of an erroneous jury instruction. The court submitted an *Allen* charge to a deadlocked jury. The charge was defective because it failed to emphasize the necessity of remaining firm in each juror's own beliefs. The court held the instruction was both contrary to and an unreasonable application of clearly established federal law, and granted relief.

### Search and Seizure

The Supreme Court recently reaffirmed that there is no crime scene exception to the warrant requirement. In *Flippo v. West Virginia*, — U.S. —, 120 S.Ct. 7 (1999), the police were called to the scene of a domestic disturbance. They found the defendant's wife dead and commenced to conduct an exhaustive search of the property. The court held that while police may search for other victims, or the killer, they cannot conduct a general search without warrant.

*United States v. Pruitt*, 192 F.3d 132 (11th Cir. 1999). Questioning a driver stopped for speeding about matters unrelated to the stop may violate the fourth amendment. Here, the officer asked the defendant about the purpose of his trip, his occupation, and how much he paid for his van. He also asked if there were drugs or anything illegal in the van. The officer finally asked for and received consent to search. Court holds the lengthy detention, in the absence of reasonable suspicion, was improper. Court also expressed concern that the defendants were detained solely because they were Hispanic, and the van had out-of-state tags.

### Sentencing

Addressing departures, the court in *United States v. Coleman*, 188 F.3d 354 (6th Cir. 1999), held that any factor not specifically forbidden by the guidelines can be the basis for a departure. The court further held that a sentencing court may aggregate departure factors that standing alone may not be sufficient to support the departure. Here, selective prosecution was a permissible factor to consider.

The defendant's sentence in *United States v. Crawford*, 169 F.3d 590 (9th Cir. 1999), was enhanced based on his distribution of drugs within 1000 feet of a school. The defendant was originally charged with distributing drugs in a protected location, but pleaded guilty to a different distribution charge which was not in a protected location. The enhancement was based on relevant conduct. The court held that relevant conduct has no role in choosing the applicable offense guidelines section, and therefore, the enhancement was not proper.

The Sixth Circuit recently addressed the ability to impose a more severe sentence on a defendant following a successful appeal. In *United States v. Jackson*, 181 F.3d 740 (6th Cir. 1999) the judge relied on a revised pre-sentence report, which included a prior conviction that the original report had overlooked. Under *North Carolina v. Pierce*, there is a presumption of vindictiveness when a harsher sentence is imposed, which can be rebutted in some cases. The court held that the presumption was not rebutted in this case, even though the court thoroughly articulated its reasons for imposing a more severe sentence. The factors on which the sentence was based existed at the time the original sentence was imposed, and the court failed to set forth any conduct or factor which came to the court's attention after the first sentence was imposed.

Unjustified departures - *United States v. McMurtrey*, 200 F.3d 499 (7th Cir. 1999). The Court departed below the statutory minimum on a co-defendant without a government motion. As a result, the co-defendant received home detention, while the other defendants faced sentences ranging from 135 to 198 months. Court holds *unjustified departure* on a co-defendant may be basis for departure sentence on other defendants. This is different from the case where departure for the co-defendant is justified, which cannot be basis for departure.

Sentencing - aiding and abetting - *United States v. Hendrick*, 177 F.3d 547 (6th Cir. 1999). Defendant was convicted of aiding and abetting the possession of a firearm by a felon. The principal's offense level was 24, based on 2 convictions for controlled substance offenses or crimes of violence. The Court assessed the same offense level to the defendant,

even though he did not have two such convictions. Court holds the offense level must be based on the defendant's own criminal record.

In *United States v. Dale*, 178 F.3d 429 (6th Cir. 1999), the defendant was charged with conspiracy to distribute both crack cocaine and marijuana. The jury returned a general verdict finding the defendant guilty. Court holds that where general verdict is returned, court should sentence the defendant for the offense carrying the shorter sentence.

### Miscellaneous

An extremely significant decision is *Dodd v. State*, 2000 WL 12030, 2000 OK CR 2 (Okla. Crim. App. Jan. 06, 2000) (No. F-97-26). There, the court addressed the common practice of using jailhouse informers. The court noted inherent unreliability of such witnesses, and held a court should be "exceedingly leery" of such witnesses, especially where there is an indication that they may have received some benefit in return for their testimony. The court established a procedure whereby a defendant must be given notice before trial of such testimony, as well as information concerning benefits the informant may have received, and information which could be used to impeach them. The court also required a reliability hearing.

*Brady* violations - *Strickler v. Greene*, 527 U.S. 263, 119 S.Ct. 1936 (1999). A capital defendant failed to obtain relief based on a significant *Brady* violation because he could not meet the high standard of harm to establish such violations. The state failed to disclose information which cast doubt on the strength of a eyewitness' testimony. The court had no problem in finding the undisclosed evidence was "material." However, the defendant could not go farther and establish a "reasonable probability" that the outcome might have been different. That test requires more than showing that the evidence "might have" changed the outcome. In a favorable portion of the opinion, the Court did note that the test is not whether the evidence is sufficient to sustain the verdict after discounting the inculpatory evidence in light of the undisclosed evidence. In a threshold issue, the Court held the defendant did not default this claim by failing to bring it ear-

## Post Conviction Update (continued)

lier. There was cause for not asserting the claim earlier because the documents had been suppressed, despite the prosecution's open file policy. Counsel are not required to advance claims for which they have no evidentiary support, and which based only on speculation. The fact that they knew the witness had been interviewed several times did not mean they knew there were notes of those interviews.

In *Lilly v. Virginia*, 527 U.S. 116, 119 S.Ct. 1887 (1999), the Court considered the admissibility of co-defendant's confession which placed much of the blame on the defendant. A four judge plurality held the statements were not within a firmly rooted exception to the hearsay rule, and were not sufficiently reliable to

be admissible. Even though a determination of trustworthiness is fact intensive, the Court did not consider itself bound by the lower court decision. The other judges left open the possibility that in some situations an accomplice's statements implicating a defendant may be admissible. ■

*[This summary has been prepared by Walter M. Reaves, Jr., who is a licensed attorney in the State of Texas. Mr. Reaves is Board Certified in Criminal Law by the Texas Board of Legal Specialization, and is in private practice concentrating on post-conviction litigation. He also is an adjunct professor at Baylor Law School, teaching post-conviction procedure. Mr. Reaves's can be reached at P.O. Box 55, West, Texas 76691. He also maintains a web site with information on post-conviction procedure, which can be found at [www.postconviction.com](http://www.postconviction.com).]*

## Retaliation, Publication Ban and Lack of Dental Care States Claim

The court of appeals for the Eighth circuit held that a prisoner's complaint that he was retaliated against for using the prison grievance system, denied access to all publications and denied dental care, stated a claim. Missouri prisoner Percy Cooper filed suit claiming he was wrongly placed in administrative segregation (ad-seg). While in ad seg he was denied all written materials and treatment for a toothache. The district court dismissed the complaint for failure to state a claim upon which relief can be granted under 28 U.S.C. § 1915A(b)(1), holding that Cooper's amended complaint did not state how any of the 26 named defendants had personally violated his rights.

The court of appeals affirmed in part, reversed in part and remanded the case for further proceedings. The court held that Cooper's amended complaint, read in conjunction with the original complaint, did in fact state a claim against several of the defendants. Section 1915A dismissals are reviewed de novo on appeal and pro se plaintiff's complaints are to be liberally construed.

The court held that it is well established that the denial or delay of treatment for painful dental conditions states a claim for relief.

"Given Cooper's allegation that he was denied all magazines as well as copies of other specific publications, we believe the prison would be obligated to proffer a legitimate reason for any decision to deny Cooper access to these materials. Related to this claim, we conclude Cooper's allegation that DOC director Dora Schriro authorized the denial of printed materials to inmates is sufficiently specific to state a section 1983 claim for actions taken directly by her."

The court also held that Cooper's claim that prison guards shut off the water in his cell for three days and threatened his safety because he filed grievances were sufficient to state a claim for retaliation.

The court affirmed dismissal of Cooper's claims that he was not given a fair disciplinary hearing because he did not claim the violation of any federal right. Readers should note this is not a ruling on the merits of Cooper's claims. See: *Cooper v. Schriro*, 189 F.3d 781 (8th Cir. 1999). ■

## Bad Water Causes Florida Prison Evacuation

More than 700 prisoners at Florida's maximum-security Martin Correctional Institution (MCI) had to be evacuated October 26, 1999 while state crews scrambled to make emergency repairs to a water plant plagued by breakdowns, sickening odors and contaminants. Workers set up portable toilets and trucked in water for about 500 prisoners left behind.

MCI operates its own water plant just outside the prison gate. The plant gets water from seven nearby wells. State Department of Environmental Protection (DEP) records show the wells have continually been clogged, out of service and unproductive. For years DEP employees have criticized MCI officials for ignoring prisoner complaints and failing to warn prisoners of potential health hazards. The DEP records show that prison officials:

- \* Objected to having to tell prisoners about high lead and thallium levels in the water (as the law requires), claiming that doing so may cause prisoners to riot.

- \* Argued that high lead levels threaten only children and pregnant women -- not adult male prisoners (apparently ignoring the fact that women and children frequently visit the prison).

- \* For years failed to test its water as often as the DEP required and refused to complete a DEP survey of the prison's water system.

"DOC... seems to be thumbing its nose at the DEP districts," wrote Geoffrey Mansfield, of the DEP's water facilities division, in a December 1994 memo.

The evacuation was ordered after three of the wells failed and water pressure dropped too low to provide safe drinking water. Prison officials were given the go-ahead to bypass normal bidding procedures and under an emergency order authorized a Palm City engineering firm to begin immediate repairs and drill new wells.

Immediately following the evacuation DEP officials gave permission for the prison system to build a recycling plant to treat sewage water that could then be reused to flush toilets, reducing water consumption by 40 to 50 percent. ■

Source: *Palm Beach Post*

## Investigators Probe Ohio Paroles-For-Sale Scam

After receiving a tip from an unidentified informant in June of 1997, Ohio prison officials uncovered evidence of a parole-for-pay scam. While screening prisoner mail, officials read a letter from Grafton Correctional Institution prisoner Bubba Shumate addressed to Lynn Moore, a former Grafton prisoner who was paroled in 1997 and reimprisoned five months later on a parole violation.

"You said a year ago that this thing would cost me 5 grand," Shumate wrote Moore, who was then serving a two-year sentence at the Lorain Correctional Institution (directly across the road from Grafton). "A year later... it will cost me 5 grand more. What's up with that?"

Prosecutors say Moore and his friend, Willie Ray Patton of Cleveland Heights, are at the center of an alleged parole-for-pay enterprise, which consists of at least eight Ohio prisoners or prisoner family members, believed to be

responsible for bribing an unnamed state employee.

Prosecutors filed hundreds of pages of letters and documents in Lorain County Common Pleas Court that they will use to show that Moore, 44, and Patton, 51, would find out when Ohio prisoners were eligible for parole hearings and then solicit money to arrange for their releases.

The two were indicted in September, 1999, on charges of engaging in a pattern of corrupt activity, bribery and complicity to escape. None of the other prisoners or family members were named or indicted. Harold Miller, an Ohio parole board hearing officer was "mentioned" in the indictment but not charged.

Shumate had his daughter pay \$5,000, but was not paroled until two years later. When Shumate became upset about the delay, he wanted answers. Moore wrote back to him and blamed Patton.

"Hey, old dude, I went to Ray [Patton] today, and we had a long talk," Moore wrote to Shumate, 63. "And I think

he has gotten the proper understanding. He has the letter, and he's going to the lawyer with it."

County prosecutors said they were investigating whether "the lawyer", a man they think helped arrange the paroles, is Miller. Prison officials said that Miller, 62, has a law degree, but declined to comment on his possible involvement in the scheme.

Miller was placed on paid leave pending the outcome of the state's investigation. On March 29, 2000, Miller was arrested and charged with engaging in a pattern of corrupt activity and five counts of bribery. He is free on \$10,000 bond.

Miller, in an interview with state investigators, denied playing a role in any illegal activities. But in court records filed in the case, prosecutors say that Miller made 140 phone calls to Patton over a three month period in 1996. ■

Sources: *Lorain Morning Journal*, *Cleveland Plain Dealer*

Tele-net

# FDOC Hazardous to Prisoners' Health

by Mark Sherwood and Bob Posey

■ Thirty percent of the 129 doctors who provide medical care to prisoners incarcerated in the Florida Department of Corrections (FDOC) have marks on their records ranging from malpractice to fraud. The FDOC rarely fires or disciplines doctors it hires, even in cases where negligence causes prisoners to die.

■ Dozens of Florida prisoners have died since 1994 after receiving inadequate health care.

■ Recent state and federal legislation have made it almost impossible for prisoners to successfully sue the Department of Corrections when subjected to medical malpractice, even when it results in disfigurement or life-threatening complications. Even if legal action was successful, prison doctors are shielded from personal liability and taxpayers are required to cover any legal judgments against the doctors.

■ At least one in every nine Florida prisoners suffers from severe mental illness which prison guards are not trained or equipped to deal with.

The above are just a few of the findings of a special investigative report conducted by the *St. Petersburg Times* recently. In a three part series that made headlines in that Central Florida newspaper during the month of September, facts and statistics were revealed about the Florida prison system that had been concealed from the public.

While prisoners in Florida, and their families, have been very aware that the quality of medical care has been going downhill for several years, and while taxpayers have been paying more and more, the Department of Corrections has been able to keep the true state of affairs from public scrutiny.

The special report by the *Times*, judgments against the doctors which ran from September 26<sup>th</sup> through the 28<sup>th</sup>, shows that the DOC has been a dumping ground for troubled physicians. Doctors who have repeatedly lost malpractice claims, been found guilty of sexually abusing their patients, been found guilty of fraud, and who only have temporary or restricted licenses, or who have been dis-

ciplined by the State Board of Medicine, are a bargain for the DOC. And that appears to be the real incentive for the DOC, which is constitutionally required to provide at least some health care for the 68,000 prisoners in its custody.

## Life and Death Cost-Cutting

The average doctor straight out of medical school averages \$120,000 a year. The DOC pays far less, with salaries for the doctors it hires to treat prisoners running from \$72,000 to \$86,000 a year. With prison doctors being fully indemnified by the state, the prison system offers a safe haven for troubled doctors by allowing them to avoid malpractice insurance that increases when a doctor has problems.

David Thomas, the DOC's chief doctor, admits that economics is a factor in the quality of doctors hired by the department. But that does not trouble him. "Clearly, you would prefer people that don't have any problems," Thomas said. "But I do think there is a place for well trained people who have made a mistake, and we may be well placed to do that because we have a degree of control over our doctors that the outside world does not."

The *Times* reported in the first of its investigative series that dozens of prisoners had unnecessarily died after receiving inadequate medical treatment since 1994. Some critics question the reasons why the DOC is so willing to hire doctors with questionable histories and put them in charge of a \$225-million health care system, and the lives of prisoners.

"Those numbers are pretty atrocious", said Randall Berg, a lawyer with the Florida Justice Institute in Miami. "it shows they really don't care what level of care is provided - they're operating on the cheap."

## Shady Physicians

The *Times* investigation discovered that of the 129 doctors employed by the DOC sixteen have had to pay off previous medical malpractice claims in Florida, some more than once.

Fourteen prison doctors – or 11 percent - have disciplinary records with the state medical boards, a relatively rare distinction where last year less than half of 1 percent of the nation's doctors were disciplined by a medical board.

Seven of the DOC doctors have been disciplined more than once by medical boards and nine are listed in a book entitled *Questionable Doctors* that is put out by a national consumer group.

Three of the DOC's doctors have a history of sexual misconduct with patients.

Fifteen of the DOC's doctors are practicing on temporary or restricted licenses. Because of an exception in Florida's law, doctors who have restricted licenses or have not passed either the Florida or national medical exam, but are licensed in another state, may work in Florida's prisons.

Overall, only one-third of all the DOC's doctors are certified in a specialty, a requirement generally necessary to work at a hospital or for an HMO.

Between 1996 and 1998 the DOC admits it only reported three doctors to the state medical board. Two of those doctors, Abigail Rosario-Rivera and Frederick Vontz, are still employed by the DOC even after being reported to the medical board for negligently allowing prisoners in their care to die.

The department is even willing to hire and place in positions of authority doctors who commit crimes. Dr. Robert Briggs, the chief medical executive at Charlotte Correctional Institution, plead guilty in federal court in 1981 to filing fraudulent Medicare payment invoices.

Other examples of questionable doctors noted in the *Times* report include Dr. Effong Andem. He was disciplined in 1994 by the army on charges that included "lack of attention to detail, failure to assume responsibility for patients, failure to admit or recognize errors, and failure to learn from mistakes." The next year, he was hired by the DOC.

Dr. Mireya Francis was disciplined by the Florida Board of Medicine in 1993 for dispensing drugs to mentally ill patients without first performing psychiatric evaluations. In 1995 she was again disci-

plined for lying in her application about being denied from practicing medicine in Ohio. The DOC hired her despite those marks on her record.

Dr. Arnold Azcuy is a medical executive at North Florida Reception Center. He is in charge of reviewing prisoners' medical cases statewide and makes cost-control decisions about when to deny care. Dr. Azcuy paid out on three medical malpractice suits before coming to work for the DOC. Two of his claims, both in 1993, involved the deaths of his patients.

Another DOC doctor, Stanley Dratler, lost his medical license for three years in 1986 for fondling female patients. Before coming to the DOC, Dr. Jose Gonzalez was disciplined by the medical board after giving the wrong medicine to a pregnant woman causing her uterus to rupture and the fetus to die.

### Dying by the Dozens

The DOC maintains that the, medical care being provided to prisoners is as good as one can get on the outside. But then they never thought anyone would care enough to look closer, or that DOC Secretary Moore would unintentionally open up Pandora's box.

Earlier this year Moore proposed to Gov. Jeb Bush that money could be saved if three oversight committees, the Florida Corrections Commission (FCC), the Correctional Medical Authority (CMA), and the Correctional Privatization Commission (CPC), were done away with. Moore told Bush that those entities (that provide a measure of oversight of the DOC's operations) are unnecessary, that the department can supervise itself.

That proposal ruffled a few feathers and focused attention on just what those committees do, ironically they are very seldom ever heard from or mentioned in the news.

The members of the CMA, a group set up by the legislature to audit prison medical care in 1993, apparently did not appreciate Moore's proposal to do away with them and in September they struck back with a news release that prompted widespread media coverage.

According to the CMA, since January 1994 at least 56 Florida prisoners have died from inadequate medical treatment. That's almost one in eight of the 463 death

records that the CMA reviewed for that period.

"These deaths could have been prevented," said Linda Keen, executive director of the CMA. Instead, for years, CMA records indicate, Florida prisoners have been dying by the dozens as a result of substandard or simply negligent medical care.

The CMA has been doing the job it was authorized to do. It pays consulting fees to private doctors with no ties to the DOC to review a sampling of deaths at the state's prison hospitals.

Every few weeks the CMA sends a report on the findings of those doctors to the governor, the legislature, and the DOC. But the CMA cannot tell the DOC to do anything, their power being strictly limited by law.

Kay Harris, who is in charge of preparing the CMA reports, said she feels that despite the obvious problems exemplified in the reports that nothing ever changes. "The average John Q. Citizen doesn't care about inmate health care," Harris said.

The chief administrator of the DOC's health care system, John Burke, disputes that the department is at fault. Despite the CMA's assertions, the department's record is a good one, he claims. "A percentage of people are going to die no matter what you do, and I don't think our percentage is inordinately high considering the population we take care of," Thomas said.

Thomas also noted that there are an additional 820 prisoner deaths since 1994 that the CMA hasn't reviewed, and knowing that they don't have the funds, he disingenuously asked why they didn't review them - too. "We're not perfect," Thomas defensively said, "People make mistakes, and other people suffer for it."

### Bedlam in the Sun

The *St. Petersburg Times* report did not stop by just looking at the medical hell that Florida prisoners are increasingly being subjected to. The third part of the *Times'* series explored the care that the increasing number of mentally ill prisoners receive while in Florida's prisons.

According to a recent study by the U.S. Justice Department, an estimated 284,000 prisoners - 16 percent of the U.S. prison and jail population - suffer from

severe mental illness. (See: *FPLP*, Vol. 5, Iss. 5, "Mentally Ill Prisoners") Many experts say that the Justice Department's study confirms the belief that prisons have become the nation's new mental hospitals.

With the wholesale closings of public mental hospitals in the 1960's and the prison-building boom of the past two decades, prison often becomes the only option available to mentally ill persons unable to cope with the pressures of society. From a high of 559,000 in 1955, the number of patients in state hospitals nationwide dropped to just 69,000 in 1995. At the same time, the number of jail and prison beds has quadrupled in the last 25 years, with over 1.8 million Americans now behind bars.

Florida is not an exception. As noted in the *Times* report, with the state prison population over 68,000, at least one of every nine prisoners in Florida suffers from severe mental illness.

For some of the incarcerated mentally ill, prison offers access to psychotropic drugs and treatment that they might not receive on the outside. But for others, prison often exacerbates their illnesses as they struggle to deal with officers unable or unwilling to distinguish between mental symptoms and willful unruliness. Punishment and discipline against mentally ill prisoners is common and on average results in considerably longer time behind bars, the Justice Department study found.

"A prison is absolutely the worst place for somebody with severe mental illness, and absolutely certain to exacerbate their symptoms," said Ron Honberg, legal director for the National Alliance for the Mentally Ill.

John Burk, deputy director for the Florida DOC's health care system, said, "Once these guys are put in prison they've got to function in a structured environment, a very structured environment, and some of them can't. But that's not a correctional officer's fault."

Many experts feel that without it being necessary to assign just who is at "fault," it is obvious that the Florida DOC is doing a poor job of dealing with a growing crisis within the prison system as concerns the mentally ill. Mental health staff in the prisons are often overwhelmed by their case loads and operate in an atmosphere where guards and



## Florida Health Care (continued)

administrators view mental health staff as coddlers who are easily manipulated by prisoners.

"Often its security who wants to make the call that inmates [fake mental health problems], so that it's okay not to provide treatment for them. There's an attitude that all inmates are [faking]," said Helen Cunningham, who quit the DOC in August as Baker Correctional Institution's senior psychologist. Cunningham said she often had to wait days before guards would bring prisoners requesting mental health care to her. She said she was treated worse by prison guards if she wrote up reports on allegations that prisoners had been abused, as she was often required to do.

The DOC spends over \$46 million a year on mental health, but still is falling behind. In the last two years at least 65 mental health staff positions have been cut. The increasing numbers of mentally ill entering the system and the rising costs of psychotropic drugs is growing faster than the DOC budget.

"It's being tightened down as tight as we can get it," said DOC's John Burke. "[But] we think we're still providing care that meets the constitutional standard." Not so, says others, even former DOC employees.

### Destructive Solution

"As they cut mental health services, which is what they're doing, you are going to have more and more inmates who are unmanageable because of mental illness," said Connie Schenk, a former DOC psychologist who quit in frustration during August. (See: This issue [of *FPLP*], "Beatings, Corruption, Cover-ups Detailed to Senate by Prison Psychologist.") "The way [the DOC] deals with mentally ill inmates who can be problematic is just to put them into close management [sensory depriving confinement], where they don't get near the access to help that they used to," said Schenk.

According to Terry Kupers, a forensic psychologist who wrote a book about the devastating impact that confinement can have, prisoners left with little contact with others often become psychotic and filled with rage.

Social science and clinical literature have consistently reported that when even mentally normal human beings are subjected to social isolation and reduced environmental stimulation, they may deteriorate mentally and in cases actually develop psychiatric disorders. The effects of such isolated confinement almost certainly creates more problems for those already suffering from mental illness.

"It becomes a vicious circle especially if the mentally ill inmate hurts an officer," commented Kupers. "Rather than providing any therapeutic treatment, the guards can get more and more brutal, and then the inmates become even more violent and disruptive. It just escalates."

Kay Jamison, a professor of psychiatry at the John Hopkins School of Medicine, notes that, "The incarceration of the mentally ill is a disastrous, horrible social issue." Subjecting the mentally ill to isolated confinement situations "can exacerbate their hallucinations or delusions," Jamison said.

Yet, despite the wealth of evidence showing the destructive and damaging effects of isolated confinement on the mentally ill, the Florida DOC has actually increased its use, and plans to increase it even further without consideration of the long term effects or the eventual cost to society or taxpayers. (See: *FPLP*, last issue, "The Return to Draconian Days in FDOC").

### Decades of Neglect

Allegations and evidence that the medical care available to Florida prisoners is far below recognized standards, and that unnecessary deaths result from same, are nothing new. For 20 years, between 1973 and 1993, Florida's prison system was under the control of federal courts in a case that started out challenging the poor quality of medical care provided to state prisoners.

Throughout that case court appointed medical teams found that prison officials were providing below-standard medical care time after time. After costly improvements, and pressure from the federal court, that case was finally settled in 1993, with the state promising to provide medical and mental health treatment equivalent to the community's standard of care.

Bill Sheppard, the lawyer who represented prisoners in that federal case, said

that the problem today is the same as it was two decades ago: Lack of money.

"Every damn death I've seen is a sad story," Sheppard said. "And the legislature is the ... damn cause of it.

Another lawyer, Randall Berg of the Florida Justice Institute, said medical care did improve in the prisons up through the lawsuit in 1993.

"Things got measurably better. But it didn't take long for it to get back where it was .... And it's getting progressively worse," Berg commented.

It has become so bad and problems are so rampant that even Florida's normally prison-myopic legislators have had to take notice. According to Sen. Skip Campbell, vice chairman of the Senate Criminal Justice Committee, "I can assure you I get a letter a month from inmates saying, 'I'm not getting proper care.' I'm starting to believe now that maybe they aren't getting the treatment [they need]." ■

[Sources: *St Petersburg Times*, *Orlando Sentinel*. Reprinted with permission from *Florida Prison Legal Perspectives*.]

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# Palestinians Still Imprisoned Despite Peace Process

by Iñaki Markiegi

Today Palestinians remain foreigners in their own land. Faced with the apathy of the international community, the nearly two and half million Palestinians living in the Gaza Strip and in the West Bank, the million in the Israeli State and the more than three million Palestinians in the diaspora continue to demand their right to freely choose their own destiny.

If there is a point essential to the understanding of this in a permanent climate of seemingly fruitless negotiations, of "negotiations of renegotiations," it is the dramatic situation of the Palestinian political prisoners; they have become - as have political prisoners in so many other conflicts throughout the world - those most vulnerable, subject to all manner of pressures. The Israeli authorities have used the ploy of exchanging the freedom of prisoners in return for political profits: "prisoners in exchange for the abandonment of demands for sovereignty." It is, needless to say, a measure that generates severe tensions in the Palestinian community.

In February of 1991 the Israelis held 15,000 Palestinian citizens in thirteen prison centers. The most important of these, Ansar III, in the middle of the desert, is infamous for the harsh conditions and treatment given its approximately 8,000 detainees [see *PLN*, Mar 1998, "Kafka in the Desert"]. An indication of the Israeli government's repression is that, since 1967, 150 Palestinians have been killed in the prisons. Since 1989, another 17 have died either because of extreme prison conditions or the systematic denial of medical help.

Since 1985, according to a UN Human Rights Commission report, at least 5,000 Israeli and Palestinian citizens have suffered "administrative detention" (as a result of the application of a law dating from era of the British Mandate before 1947) and been imprisoned without charge for periods of six months, renewable by military authority. Of the 80 prisoners in "administrative detention," 11 have spent more than three years in prison without being charged. This same

UN report states that 85 percent of the 1,000 to 1,500 Palestinians interrogated annually by the Israeli Intelligence Service have been subjected to some form of torture.

Today the number of Palestinian political prisoners in Israeli prisons is approximately 3,000. Among them, more than 1,000 are condemned for life, 200 have spent more than 10 years in prison and another 400 are condemned to more than 20 years.

The Israeli prison administration maintains a policy of collective punishment against Palestinian prisoners. Punitive actions range from denying family members the right to visit to denying food rations. An example was the transfer by the Shattah prison administration of 70 prisoners to a special unit. Kept in isolation cells, the detained Palestinians were beaten, their clothing and belongings burned and they were denied the right to see members of their families for more than six months. This kind of repression gave rise to a massive hunger strike and to denunciations by the prisoners demanding the punishment of those responsible. The same situation has been repeated in other penal centers.

The harsh measures imposed by the Israelis do not affect only prisoners; they also affect their relatives. The Israeli government permits visits only from first degree relatives (parents, children and spouses), however the Intelligence Service often intervenes directly so that even these relatives may not visit inmates "for reasons of security."

Forty Palestinian prisoners from Israel itself also find themselves imprisoned in Israeli penal centers. Their situation is not subject to any accord or to the possibility of future negotiation between the Palestinian National Authority and the Israeli government since the Barak government considers them "Israeli citizens." The Palestinian prisoners' movement, however, rejects this as it considers them integral members of the Palestinian community.

That Palestinians are kept in prison in a period considered to be one of peace

shows an intent on the part of the Israelis to undermine the negotiations, to use prisoners as hostages. At the same time, every prisoner freed is received with great joy and massive celebrations in his or her honor in the Palestinian community.

The freeing of these prisoners presents a new problem: the social and professional integration of these individuals who have turned themselves over completely to the resistance. In addition to the inevitable psychological problems of recuperation other problems are no less important: the necessity to assume a role in society, and to acquire work and the economic means to maintain their respective families and the desire to contribute actively to the construction of a new Palestinian nation. ■

Source: *Página Abierta*, October, 1999. Translated and edited for space by *PLN*

## Inmate Classified

# Texas Death Row Hunger Strike

Scores of death row prisoners in Texas kicked off the new millennium with a planned 21-day hunger strike over intolerable conditions of confinement. As many as 100 death row prisoners as well as hundreds of other ad-seg prisoners participated in the hunger strike, according to reports by Gloria Rubac published in *Workers World*.

Texas prison officials deny that a large scale hunger strike took place. The *Dallas Morning News* reported that prison officials would admit to only 48 death row prisoners refusing some, but not all, meals.

"If they don't eat, that's their own thing," Texas prison official (media flack) Larry Fitzgerald told the *Morning News*. "We offer the food to them. They can refuse it."

But according to *Workers World*, over 100 death row prisoners at the Terrell Unit participated as well as more than 500 ad-seg prisoners at the Darrington, Michael, McConnell, Robertson, Allred, Beto I, and Estelle units. The prisoners called the action a "non-disruptive show of unity with the goal of gaining attention to the conditions here by the public, the news media, the prison administration, thereby hopefully making a change for the better in our overall treatment," reported *Workers World*.

The protest appears to have been widespread and well planned. Every work day from January 1 to January 21 supporters of striking prisoners gathered in front of the downtown Houston offices of the Texas Department of Criminal Justice, chanting slogans and passing out literature to passers by.

"Death row prisoners at Terrell spend 23-24 hours a day alone in a 6 feet by 10 feet cell that does not have bars but a solid steel door," the Texas Death Penalty Abolition Movement wrote in a pamphlet passed out in front of TDCJ headquarters. "They are denied contact with any human beings and spend their time alone in total isolation. Those who get recreation, have it alone. They eat alone in the cell and are taken to shower alone. They are no

longer allowed to participate in the work program, to watch television, to make crafts or art work, and only those on top disciplinary status are allowed radios."

More than 100 of the 450 men on death row have been moved from the Ellis Unit to an ad-seg wing of the new super-max Terrell Unit. The rest are scheduled to be transferred by summer. The move from Ellis to the much harsher conditions of the super-max Terrell Unit was prompted by the Thanksgiving Day 1998 death row escape of seven prisoners from the older Ellis Unit [See: Daring Death Row Escape Shakes Up Texas, *PLN*, April '99].

Support for the striking prisoners spread to other countries. According to *Workers World*, activists in several cities in Italy went on solidarity hunger strikes and mailed letters of protest to Texas prison officials. A solidarity protest was reportedly held in front of the U.S. embassy in London. And the Texas Abolition Movement reports that solidarity messages poured in from far and wide -- San Francisco to Detroit, Australia to Germany.

TDCJ officials tried at first to deny the existence of the strike, and instituted repressive measures to crush it, including censorship of incoming and outgoing mail relating to the action, calling it "gang related."

Some messages did get through, however. In a letter to the Abolition Movement, one prisoner wrote: "We want all of you supporting us to know... we are standing strong and refusing food as we said; however, the correctional officers are purposely marking us down as having eaten. If this is brought up in an attempt to knock the wind out of your sails, know that the paperwork is maliciously being forged with lies to cloak our resolve. We are still committed regardless of what lies are put forth by the administration." ■

Sources: *Workers World*, *Dallas Morning News*

## Transfer Moots Wiccan's Claim

The court of appeals for the Eighth circuit held that a prisoner's transfer to a different prison mooted his religious rights lawsuit. Duane Smith is an Iowa state prisoner of the Wiccan faith. He filed suit seeking declaratory and injunctive relief to the effect that officials at the Iowa State Penitentiary (ISP) had violated his First amendment rights by denying him various items necessary for the practice of his religion.

The case went to trial and the district court granted declaratory relief in Smith's favor, ruling that Smith's religious rights had indeed been violated by prison officials. The court denied injunctive relief because, in the meantime, Smith had been transferred to the Anamosa State Penitentiary (ASP). The lower court held that Smith's claim for declaratory relief was not moot because it was "capable of repetition yet evading review" in that, given Smith's disciplinary record and his remaining sentence of 20 years, it was likely he would be returned to ISP.

The court of appeals vacated and remanded. The appeals court did not reach the merits of Smith's First amendment claim. Instead, the court ruled that Smith's transfer from ISP mooted his claim for declaratory relief as well as his claim for injunctive relief. The court held that the "mere possibility" of a transfer back to ISP was insufficient to bring the claim within the exception to the mootness doctrine embodied by the claim being capable of repetition but evading review. The court noted there was no evidence that prison officials had orchestrated Smith's transfer for the purpose of mooting the claim, which presumably would have changed their view of the matter. Because the transfer mooted Smith's claims, the court vacated the ruling and remanded the case to the district court with instructions to dismiss the case.

The court does not indicate if Smith's religious beliefs were accommodated at ASP after he was transferred there. Readers should note that claims for money damages do not become moot once the injury has been sustained and thus would not be affected by a prison transfer or release from prison. See: *Smith v. Hundley*, 190 F.3d 852 (8th Cir. 1999). ■

# International Perspectives on the Death Penalty

Review by Julia Lutsky

The United States is finding itself increasingly isolated by its intransigence with respect to the death penalty. At a time when the rest of the world is moving toward eradication of this barbaric practice, the United States almost alone of all nations is moving to increase its application. According to the report, *International Perspectives on the Death Penalty: A Costly Isolation for the U.S.* issued by the *Death Penalty Information Center (DPIC)* in October of last year, "during the recent visit ...by Mary Robinson, the UN [Human Rights] High Commissioner, even China, "the world's foremost executioner for years, committed itself to monitor human rights within its own borders and reported a sharp drop in ... executions."

Western Europe has abolished the death penalty entirely, the 40 nation Council of Europe has called for its banning, the UN Commission on Human Rights voted a moratorium on it last year, and Pope John, when he visited the United States last year, "was unequivocal, 'I renew the appeal I made [previously] for a consensus to end the death penalty, which is both cruel and unnecessary.'" The number of confirmed judicial executions carried out throughout the world dropped from 4,272 in 1996 to 1,625 in 1998. Of those in 1998, 68 were carried out in the United States.

Of the several international covenants concerning human rights, the International Covenant on Civil and Political Rights (ICCPR), the UN Convention on the Rights of the Child, the American Convention on Human Rights, the International Convention on the Elimination of All Forms of Racial Discrimination (the Race Convention), the United States has ratified the ICCPR, with stringent restrictions on its application, and the Race Convention.

Specifically, the report cites five areas of concern to the international community: "the execution of juvenile offenders, the execution of those suffering from mental retardation or severe mental illness; the execution of foreign nationals who were not informed of their rights under the Vienna Convention on Consular Relations; the arbitrary application of the death penalty and the

related problem of racial bias and the length of time that death row inmates spend in extreme isolation and deprivation between sentencing and execution." In each of the areas the United States has acted in violation of international norms and has defended itself by citing specific exceptions it has made to the ICCPR. "The overall US response to ... criticism is to ignore it." Particularly egregious to the international community is the attitude toward foreign nationals: "international law, even when it is ratified by the US, is often disdained, particularly by state governments. As ... the California Attorney General's office said, 'Californians elect their legislators and their governor to write

the laws ... and they should not have to abdicate that authority to foreign treaties approved by someone in Washington.'" Howard Safir, New York City's Police Commissioner, when reminded of the Vienna Convention, commented, "Oh, right, that['s a] treaty we're not enforcing." Such an attitude, obviously, leaves US nationals at risk when they travel to other countries.

The report was written by Richard C. Deiter, Executive Director of the *DPIC* and is available for \$6/copy from their offices at 1320 18<sup>th</sup> Street NW, 5<sup>th</sup> floor, Washington, D.C. 20036, (202) 293-6970. The executive summary is available on *DPIC*'s web site at [www.essential.org/dpic](http://www.essential.org/dpic). ■

## Claim For Perspective Relief Moot Upon Release

by Ronald Young

The court of appeals for the Tenth circuit held that when a prisoner's claim for perspective injunctive relief regarding conditions of confinement becomes moot, the prisoner's parole or supervised release status does not, absent some exceptional showing, bring that claim under the narrow "capable of repetition, yet evading review" exception to the mootness doctrine.

This otherwise frivolous conditions of confinement case revolves around the mootness doctrine. A federal prisoner had brought an action under the First Amendment and Religious Freedom Restoration Act. The lower court granted summary judgement in favor of prison officials. The prisoner appealed but was subsequently released on supervised release.

The appeals court determined that before reaching the merits of the case the jurisdictional question of mootness must be considered. It found that a claim brought by a prisoner "seeking prospective mandamus relief related solely to conditions of confinement becomes mooted" by that prisoner's subsequent release on parole or supervised release.

In a previous decision, *McKinney v. Maynard*, 952 F.2d 350 (10th Cir. 1991), the Tenth circuit had held that a prisoner's claims for injunctive relief "to allow him to engage in certain religious practices while in prison" was not mooted by parole status, since circumstances could

result in the prisoner being reincarcerated and subjected to the acts about which he originally complained.

Now, the Tenth circuit has overruled *McKinney* by holding that the prisoner's "parole or supervised release status does not, absent some exceptional showing, bring that claim under the narrow 'capable of repetition, yet evading review' exception to the mootness doctrine." The appeals court stated that "when a favorable decision will not afford plaintiff relief, and plaintiff's case is not capable of repetition yet evading review, we have no jurisdiction under Article III."

The appeals court reiterated the U.S. Supreme Court's explanation in *O'Shea v. Littleton*, 414 U.S. 488, 94 S.Ct. 669 (1974), that past exposure to illegal conduct does not in itself show a present case or controversy regarding injunctive relief if unaccompanied by any continuing, present adverse effects.

"Moreover," the court concluded, "the narrow capable of repetition exception to the mootness doctrine applies only where the following two circumstances are simultaneously present: (1) the challenged action is in its duration too short to be fully litigated prior to cessation or expiration, and (2) there is a reasonable expectation that the same complaining party will be subject to the same action again." See: *McAlpine v. Thompson*, 187 F.3d 1213 (10th Cir. 1999). ■

# Grievance Procedure Not Required by PLRA in all Lawuits

The Ninth Circuit court of appeals has held that California state prisoners who seek only monetary damages in federal civil rights suits need not file a prison grievance before filing suit.

MacArthur Rumbles, a California state prisoner, filed a civil rights suit against prison guards seeking monetary damages. The guards filed a motion to dismiss the suit because Rumbles failed to file a prison grievance prior to bringing suit, as required by the Prison Litigation Reform Act (PLRA), 42 U.S.C. § 1997e(a). The district court denied the motion and the guards appealed.

The Ninth Circuit asked Michelle Anderson and Courtenay Keough McKeon, law students under the supervision of attorney Susan Christian, Director of the King Hall Civil Rights Clinic of the University of California at Davis, to prepare a brief for Rumbles.

The Ninth Circuit held that the PLRA administrative remedy exhaustion requirement is not jurisdictional. Adopting the

Fifth Circuit's holding in *Underwood v. Wilson*, 151 F.3d 292 (5th Cir. 1998), the court held that 42 U.S.C. § 1997e(a) does not have the "sweeping and direct" statutory language that goes beyond a requirement that only exhausted actions be brought." Additionally, 42 U.S.C. § 1997e(c) authorizes a district court to dismiss certain unexhausted claims. Since a court cannot dismiss a suit unless it has jurisdiction, 42 U.S.C. § 1997e cannot be jurisdictional.

The Ninth Circuit noted that authorities are split on the issue of whether a prisoner seeking only money damages must file a grievance when the grievance procedure doesn't allow money damages. However, the court held that its decision is governed by *Lunsford v. Jumao-As*, 155 F.3d 1178 (9th Cir. 1998). In *Lunsford*, the court ruled "that federal prisoners pressing *Bivens* claims need not pursue prison remedies when they are seeking exclusively monetary relief, and there are no prison remedies capable of affording

such relief." Since *Bivens* actions and § 1983 actions are related and the PLRA administrative exhaustion rule applies to both types of actions, it is logical to extend the reasoning of *Lunsford* to § 1983 cases. Therefore, the Ninth Circuits held that California prisoners seeking solely monetary damages need not file prison grievances prior to filing a § 1983 suit.

The Ninth Circuit also held that California prisoners need not file a claim under the California Tort Claims Act prior to filing a § 1983 suit. The court reasoned that Congress did not intend to include state tort claim procedures as administrative remedies prisoners were required to exhaust. The Ninth Circuit noted that this is consistent with all published decisions on the issue. Therefore the Ninth Circuit affirmed the order denying the defendants' motion to dismiss. See: *Rumbles v. Hill*, 182 F.3d 1064 (9th Cir. 1999). ■

Source: *Sacramento Bee*

## V-Tech

## City Liable for Jail Sex Shows and Nude Dancing

Kent Russell

**P**LN has extensively reported on the prevalence of sexual assault and sexual harassment of women prisoners in District of Columbia prisons and jails. In "Our Sisters Keepers," by Daniel Burton Rose, [PLN, Feb. 1999] we reported on women prisoners in the District of Columbia (D.C.) jail being forced to participate in strip shows and "exotic dancing" for the gratification of guards. Several women prisoners filed suit over their forced participation in these activities. In a directed verdict under Fed.R.Civ.P. 50, the district court ruled that as a matter of law, the D.C. was liable for failing to supervise the improper sexual activities of its employees.

The directed verdict was granted after a trial. At trial the court found that the undisputed facts were that prisoners Jacqueline Newby, Bonita Pryor and Shawnez Williams, and others, were forced by jail guards to engage in strip shows and exotic dancing in the D.C. jail while nude or wearing only G strings on at least three occasions in July, 1995. The dancing took place before numerous guards and 80 to 100 prisoners.

Pryor claimed she was beaten by guards for refusing to participate in the strip shows. While the city conceded the beating was improper, it claims Pryor was beaten "for other reasons," which it did not specify. Williams' uncontested testimony was that she participated in the dancing against her will out of fear of being attacked by guards if she refused. During the dancing, on at least one occasion, guards ordered one of the prisoners to place a cigarette in her vagina, which she did.

The court noted that only seven months before the incidents in this lawsuit occurred, another federal judge had issued a ruling finding a pervasive pattern of sexual misconduct and rape at the D.C. jail. See: *Women Prisoners of the D.C. DOC v. District of Columbia*, 877 F. Supp. 634 (D DC 1994)[PLN, Dec. 1995].

In this case the city was held liable for failing to provide supervision and a safe environment for its prisoners. If the city presented any type of defense whatsoever it is not apparent from this ruling.

The court held that the city had a duty of ensuring supervisory personnel were present to safeguard the rights of prisoners and to prevent the nude dancing. "The District of Columbia has the duty, not only to train its officers in matters relating to sexual contact between prison guards and inmates, but also has the responsibility to actively devise and implement a system of supervision of its first level corrections officers in accordance with the law."

"It is inconceivable how improper sexual activities involving the entire prison population of Southeast I, with inmates numbering between 80 and 100 and three prison guards on duty as well as the presence of other prison guards from other parts of the prison could have occurred with no one in a supervisory role putting an immediate stop to them. Where such conditions obtain, the city itself has clearly violated plaintiff's constitutional and section 1983 rights. This is so whether the city can be deemed to have endorsed such violative activities or actually participated in them by failing to actively supervise its prison facilities." The court held the District of Columbia was liable to the plaintiffs. The only issue to go to the jury was the amount of damages to be awarded the plaintiffs.

The court noted "The city has failed to explain where its supervisory personnel was at the time the 'sexual dancing' was taking place." PLN reported the answer to the court's question in its February, 1999, issue. According to the *Washington Post*, Captain Yvonne Walker was the highest ranking supervisor in charge of the living unit where the nude dancing occurred. According to the *Post*, Walker was busy selecting and ordering the women prisoners to engage in the nude dancing, pour baby oil over each others naked bodies, etc. Captain Walker also did some nude dancing of her own. Given this set of facts, no wonder the city doesn't want to tell the judge where its supervisors were! See: *Newby v. District of Columbia*, 59 F. Supp.2d 35 (D DC 1999). ■

Cox

# Heck Does Not Bar Evidence in Shooting Case

by Ronald Young

The U.S. district court for the Eastern District of California held that a prisoner was not precluded from introducing evidence contradicting factual findings of disciplinary proceeding instituted against prisoner as a result of incident.

Vincent Marquez, a California state prisoner, brought a 42 U.S.C. § 1983 civil action against R.J. Gutierrez, a California Department of Corrections prison guard. "It is undisputed that during a prison-yard melee at California State Prison-Sacramento" Gutierrez shot Marquez in the leg with a rifle. The bullet wound caused considerable tissue and bone damage. In his suit, Marquez asserted that Gutierrez employed excessive force when he shot him, "thereby subjecting him to cruel and unusual punishment in violation of the Eighth Amendment ...."

Marquez indicated in pretrial declarations that he intended to "introduce evidence that he was an innocent bystander during the scuffle, or that, to the extent he was physically engaged, it was in self-defense." Marquez maintained that "the firing of lethal ammunition at an unarmed prisoner was unjustified, even if he was culpable of battery prior to the shooting."

In preparation for trial, Gutierrez "filed a motion in limine seeking an order prohibiting Marquez from introducing evidence which would contradict the findings" of a prison disciplinary hearing on the matter. Based upon a disciplinary report on the incident (called a "115") filed by Gutierrez, it was found at this disciplinary hearing that Marquez had committed battery against another prisoner named Perez. Marquez was unable to interrogate Gutierrez at the hearing, since the guard was on administrative leave at the time. And a third witness, who claimed he was the one who kicked Perez and denied Marquez had anything to do with it, was disregarded by the disciplinary hearing officer.

Gutierrez argued that *Heck v. Humphrey*, 512 U.S. 477, 114 S.Ct. 2364(1994), and *Edwards v. Balisok*, 520 U.S. 641, 117 S.Ct. 1584 (1997), compelled

the court to issue an order excluding such evidence, and even went so far as to say that under *Heck/Balisok* the entire action should be dismissed.

According to the court, Marquez's action "is distinguishable from *Heck* and *Balisok*" because Marquez "does not challenge the constitutionality of any relevant process, whether that accorded in his original conviction or in the disciplinary hearing." Marquez also was not seeking compensation -for lost good-time or for time spent in the SHU. The court found that nothing about Marquez's claim "challenges, directly or indirectly, the constitutionality of the disciplinary conviction." An "attack on the evidence relied on in the administrative hearing, however, is not an attack on the adequacy of the process accorded him at the disciplinary proceeding."

"Put directly, while plaintiff's proposed evidence disputes defendant's report, plaintiff does not seek 'damages for ... harm caused by actions whose unlawfulness would render a conviction or sentence invalid.' .... In the broadest sense then, a jury finding in favor of plaintiff in the matter at bar would not necessarily imply the invalidity of his disciplinary conviction. In sum," the court stated, "the *Heck/Balisok* doctrine does not bar (Marquez's) §1983 claim for excessive force, and also that, contrary to defendant's contention, it is irrelevant to the admissibility of evidence in this suit."

The court went on to address the issue presented by Gutierrez's motion as to whether Marquez should be precluded from introducing evidence contradicting the "115" report upon which the disciplinary hearing officer relied, and also whether collateral estoppel precludes Marquez from presenting such evidence.

"Assuming a full and fair opportunity to litigate, federal courts must accord preclusive effect to state court judgments. (Citations omitted). Both issue preclusion (collateral estoppel) and claim preclusion (res judicata) apply to actions

under 42 U.S.C. § 1983. State law determines the preclusive effect of previous state proceedings. (Citations omitted). Federal courts will give preclusive effect to fact finding by state agencies acting in a judicial capacity when the parties have had a full and fair opportunity to litigate those issues, and when state law so requires." See: *University of Tennessee v. Elliott*, 478 U.S. 788, 106 S.Ct. 3220 (1986).

"Issue preclusion prevents relitigation of all 'issues of fact or law that were actually litigated and necessarily decided' in a prior proceeding." Under California law, an issue is precluded if "(1) the issue decided in the prior adjudication is identical to the issue presented in the second case; (2) there was a final judgement on the merits; and (3,) the party against who estoppel is asserted was a party to the prior adjudication."

Also under California law, "an administrative agency decision has the same preclusive effect as a state court decision if the procedures used to render the decision satisfy three requirements: (1) that the administrative agency acted in a judicial capacity; (2) that the administrative agency resolved disputed issues of fact properly before it; and (3) that the parties had an adequate opportunity to litigate."

"California courts have concluded that prison disciplinary hearings do not satisfy" the judicial capacity requirement. The court concluded that absent an agency acting in a judicial capacity, the court could not give preclusive effect to its findings. Thus, in this case, Marquez could "not be precluded (under collateral estoppel) from litigating the issue of his culpability in the prisonyard melee." The court denied Gutierrez's motion to preclude evidence contradicting the findings of the hearing officer in the disciplinary case, certified an interlocutory appeal, and stayed the proceedings until further order. See: *Marquez v. Gutierrez*, 51 F.Supp.2d 1020 (E.D. Cal. 1999). ■

# Absent Plain Error Objection Necessary to Preserve Issues

The appeals court for the Seventh circuit held that if a pretrial ruling is definitive, objection at trial is not necessary to preserve the issue for appellate review. The court also held that objection to a guard's counsel's references to pretrial detainee as "cop killer" was forfeited, such references did not result in plain error, and the trial judge should not have denied detainee's pretrial motion outright, but the judge's error was harmless.

Jackie Wilson, a pretrial detainee, alleged in a 42 U.S.C. § 1983 suit "that James Williams, a guard at the Cook County Jail, attacked him without provocation and inflicted serious injuries." Williams contended "that Wilson was the aggressor and that the force used in defense was reasonable under the circumstances. Twice in the district court, summary judgement was granted to Williams—once by the judge and once by a jury. Both times the verdict for Williams was reversed on appeal. A second jury trial also ended in a verdict for Williams. The appeals court affirmed and rehearing en banc was granted.

"Before the second trial of his civil suit began, Jackie Wilson asked the district judge to prevent Williams from informing the jury that he had been convicted of killing a police officer. Wilson recognized that his criminal history could (possibly) be used to impeach him." The judge denied the motion in limine. Wilson tried to circumvent any damage by having his lawyer tell the jury in his opening statement why Wilson was in custody, and argued that Williams attacked Wilson because of the nature of Wilson's crime.

"Throughout the trial, Williams' lawyer did not miss an opportunity of remind the jury that Wilson had committed a despicable offense, and therefore must be a despicable person who should not collect a dime." Wilson's lawyer never objected, even though Williams' attorney strummed on "cop killer" as if it were a guitar rather than a bit of evidence. The appeals court held that whatever "line there was between proper and improper use was over-stepped." And since it found that the district court's ruling in limine did not sanction any particular use of evidence, it was necessary for

Wilson's attorney to object to Williams' repeated use of cop killer.

Since Wilson didn't object, forfeiture occurred and so "the plain-error standard governs." See: Fed.R.Evid. 103(d). "Plain error means an error that not only is clear in retrospect but also causes a miscarriage of justice." See: *United States v. Olano*, 507 U.S. 725, 113 S.Ct. 1770 (1993). The appeals court was not persuaded that justice miscarried in Wilson's trial because of the way Williams used Wilson's crime. The court felt that "Wilson may have withheld objection in the hope that jurors would deem that Williams had overplayed his hand."

## Denial of Medication Precludes Summary Judgment

The U.S. district court for the southern district of Ohio held that a genuine issue of material fact precluded summary judgement against an arrestee who was denied needed AIDS medication during his eight-day jail incarceration.

Devin Karl Murphy brought a 42 U.S.C. § 1983 action against defendants Deborah L. Bray, R.N.; Dr. Jean-Claude Loiseau, Correctional Medical Systems, Inc.; Hamilton County Sheriff Simon L. Leis, Jr., in his official capacity; and several other personnel at the Hamilton County Justice Center.

At the time of his arrest, Murphy was taking prophylactics for thrush, meningitis, herpes, medicine for depression, and a drug cocktail to inhibit the growth of the AIDS virus. Murphy did not receive his medications during his entire incarceration of eight days, even though he told jail personnel of his need for them when he was processed into the jail. And despite the delivery of the medications from Murphy's home two days later under Dr. Loiseau's orders and the complete medical profile provided by Murphy's home health care nurse, he was still denied the needed medications.

In response to Sheriff Leis's Motion for Summary Judgement, the court stated that under § 1983, Murphy must prove (1) that the challenged conduct was committed by a person acting under color of state law, and (2) that the conduct "caused" a deprivation of a person's rights or privileges secured by the laws or Constitution of the United States.

However, the appeals court found that the judge abused his discretion in denying Wilson's motion in limine outright. But the majority found that this was harmless error. "Williams' harping on the subject, and his implication that 'cop killers' are not entitled when guards behave as vigilantes, could not be thought harmless, but the lack of objection means that the misuse of the evidence has not been preserved for appellate review. As a result the judgement is affirmed." See: *Wilson v. Williams*, 182 F.3d 562 (7th Cir. 1999). ■

"As this is an official-capacity suit," the court held that Murphy "must also show that a policy or custom attributable to a government entity caused his injury." See: *Kentucky v. Graham*, 473 U.S. 159, 105 S.Ct. 3099 (1985). "A custom is defined as a practice that, while not expressly authorized, 'is a legal institution that is permanent and established.'" See: *Feliciano v. City of Cleveland*, 988 F.2d 649 (6th Cir. 1993).

In his response, Murphy stated that Sheriff Leis acted under color of law "with deliberate indifference to his serious illness." Murphy also alleged that Sheriff Leis knew a custom had developed allowing prisoners to have medications brought from home. However, this custom was in direct contradiction to Sheriff Leis's written policy and was "implemented haphazardly with no cross-checks or safeguards." There were occasions, as in Murphy's case, where family members brought medications to the jail and were refused by officials.

The court found that after reviewing the facts in the light most favorable to the non-moving party, that Murphy had raised a genuine issue of material fact as to whether Sheriff Leis knew of and disregarded an excessive risk of harm to Murphy by the custom at the jail. The Sheriff's Motion for Summary Judgement was denied and the court reserved ruling on Murphy's Cross-Motion for Summary Judgement. See: *Murphy v. Bray*, 51 F.Supp.2d 877 (S.D. Ohio 1999). ■

## News in Brief

**CA:** Dept. of Corrections sergeant Richard Selio murdered his estranged wife on Sept. 26, 1999, then shot and killed himself after a SWAT team stormed his house following an eight hour standoff. Selio was a transport officer at the California Institute for Men. His wife, Teresa, also was a CDC employee.

**Canada:** Prison director Ole Ingstrup criticized the Toronto Sun in an internal memo for what he called "negative and distorted" news reports concerning the Correctional Services department. The paper obtained a copy of the memo in Jan. 2000. News stories have focused on lavish spending by Ingstrup and other prison officials. Ingstrup defended his involvement in an international corrections conference that resulted in a \$70,000 travel bill.

**CT:** Prison recreation supervisor Larry J. Moore, 45, was arrested Oct. 12, 1999 and charged with stealing \$8,100 he had collected to pay expenses for a correctional conference. Moore, employed at Carl Robinson Corr. Institution in Enfield, allegedly misused funds designated for the National Correctional Recreation Association conference held in March 1999. He was placed on paid administrative leave.

**DE:** Adams Catalogue is a company marketing hygiene and grooming supplies to prisons and jails. All their products, shampoo, soap, toothpaste, etc., is clear and in see through containers. Company president Stuart Modell said his company is already selling to prisons and jails in 20 states and marketing hard around the country.

**IA:** On February 4, 2000, former 3rd judicial district chief juvenile court officer Daniel Conway III, was sentenced to one year in federal prison for bank fraud and wiretapping. Conway stole almost \$20,000 in state funds for his personal use and illegally tapped an employee's cell phone. Conway claims he was in an alcoholic haze and doesn't remember anything.

**MA:** In October, 1999, former federal probation officer turned criminal defense lawyer, Frederick Ford, 48, was charged in federal court with attempting to hire an undercover cop to kill two of his criminal associates. Ford was afraid the would-be

victims would reveal his involvement in the kidnapping of drug dealers.

**NC:** On Sept. 8, 1999, Wayne County sheriff's detective Bobby Braswell, 47, was charged with 22 counts of coercing sex from five female jail detainees. Braswell, a deacon at a local church, is accused of committing the sexual misconduct over a two-year period. He had resigned in April, 1999, after the sheriff received an incriminating videotape.

**NC:** U.S. District Court Judge G. Ross Anderson criticized Greenville County jail officials and their lawyers during an Oct. 4, 1999 trial in which five judges said their telephone calls to the facility had been illegally recorded.

**NE:** On February 18, 2000, Douglas County jail guard Aleet Mickles, 30, was arrested on charges of smuggling marijuana into the jail for prisoner Anthony Stanfield. Stanfield was also charged.

**NM:** On January 20, 2000, San Juan county jail guard Darren Howell was convicted of federal civil rights charges stemming from the sexual assault of jail prisoners. Howell is still facing federal drug charges. Jesus Monclova and Darrell Whitaker are also jail guards charged with sexually abusing prisoners and drug dealing in the jail.

**NY:** On January 24, 2000, Rikers Island jail guards Enrique Castillo, 34, and Irving Carabello, 39, were charged with firing a gun and threatening the employees of a nude dancing bar in Queens. The incident began when the guards started grabbing the dancers. When club bouncers tried to throw them out, Castillo pulled a gun, fired a shot in the air and fled with Carabello. Both men were suspended with pay from their jail jobs pending the outcome of the criminal charges.

**OH:** Mansfield Correction Institution guard Timothy Watkins, 40, was arrested on September 14, 1999 and charged with bribery for accepting a \$200 payment from a prisoner to smuggle drugs into the facility.

**OH:** Patricia L. Graham, 47, was pregnant and incarcerated at the Dayton Human Rehabilitation Center, a local jail, when the facility doubled

its capacity on Sept. 7, 1999 by adding bunk beds. Graham was assigned to a top bunk, which had no ladders. When she complained Graham said she was given the choice of an upper bunk or going to the hole. She tried to climb up to her bunk and fell; that evening she began bleeding vaginally, and later had a miscarriage.

**SC:** On January 16, 2000, two unidentified federal prisoners awaiting deportation to Cuba took a male guard and a female nurse hostage at the Columbia Care Facility. The facility is a hospital prison operated by Just Care, a private, for profit prison company. The prison holds 60 prisoners. The hostage takers surrendered after six hours and being promised a speedy deportation to Cuba. The hostages were unharmed.

**VA:** On January 16, 2000, Augusta Correctional Center prisoner Henry Parker, 41, was stabbed to death by two other prisoners. Parker became the third Virginia prisoner killed in six months. In September, 1999, Ricky Lewis, 37, was stabbed to death at the Greensville Correctional Center, and John Swartz, 48, was killed at the Sussex I prison after a fight with another prisoner in December, 1999.

**VA:** In Oct. 1999 former state prison guard Kevin VanVleet, 27, was convicted of aggravated sexual battery, taking indecent liberties, and assault and battery involving two boys ages 6 and 10. VanVleet had been fired from the Sussex II facility shortly after his arrest.

**WA:** In December, 1999, the King County (Seattle) jail paid \$650,000 to settle a sexual harassment lawsuit by female guards. The plaintiffs claimed they were sexually harassed by male co-workers and prisoners. \$325,000 of the settlement goes to nine female guard plaintiffs who filed the suit; \$225,000 goes to their attorneys and \$100,000 is for female jail employees who can show they were subjected to a hostile work environment.

**WA:** On February 22, 2000, Clallam Bay Corrections Center sergeant Monica Sukert, 38, pleaded guilty to having sexual contact with a male prisoner at the facility. Sukert was sentenced to one year in

jail with all but ten days suspended. Sukert is the first DOC employee prosecuted under a recently enacted law that bans sexual contact between prisoners and staff.

**WV:** During an Aug. 8, 1999 confrontation between prisoner David Williams and guards in the maximum-security

Williams II unit at the Mount Olive Corr. Center, Williams pulled a .22-caliber pistol and fired two rounds before he was subdued. No one was injured. It was later determined that Williams' girlfriend, Anna Marie Thomas, had smuggled the gun in during a contact visit by hiding it in her panties. ■

## 522 Days in BOP Ad Seg States Due Process Claim

A federal district court in New York denied prison officials' motion for summary judgment, holding that defendants failed to establish as a matter of law that 28 C.F.R. § 541.22 - the Bureau of Prisons (BOP) administrative segregation (ad seg) rule - does not create a protected liberty interest in remaining free from ad seg. The court found that summary judgment was inappropriate because the factual record was undeveloped and several material facts remained in dispute.

Federal prisoner Rene Tellier brought a pro se Bivens action alleging that deviations from § 541.22 during the 522 days he was confined in ad seg violated his right to due process under the Fifth Amendment. Defendants moved to dismiss, arguing that Tellier received all the procedural protections he was entitled to under § 541.22 and that any alleged failure to comply with the regulation did not violate any of Tellier's constitutional rights. Because the parties relied on matters outside the pleadings, the court treated the motion as one for summary judgment.

Defendants cited several decisions outside the Second Circuit for the proposition that § 541.22 does not create a constitutionally protected interest, including *Crowder v. True*, 74 F.3d 812 (7th Cir. 1996). But the court found these decisions to be unpersuasive because: (1) in all but one case, the courts based their analysis solely on the language of the rule; and (2) all of the cases involved relatively short periods of confinement, ranging from three days to six months.

The court observed that *Sandin v. Conner*, 515 U.S. 472, 115 S.Ct. 2293 (1995) "directs courts to assess 'the

nature of the deprivation endured by a prisoner rather than basing their liberty interest analysis solely on the linguistic intricacies of a particular regulation." It also noted that the less technical *Sandin* analysis is not necessarily more stringent: "it may lead a court to find a liberty interest where the language-based test did not." *Quartararo v. Catterson*, 917 F.Supp. 919, 937 (E.D.N.Y. 1996).

Observing that the Second Circuit has not read *Sandin* as eliminating all due process claims based upon ad seg, the court indicated that the Second Circuit "interprets *Sandin* to require that prisoners prove both (1) that the confinement creates an 'atypical and significant hardship' and (2) that the government has granted inmates - by regulation or statute - a protected liberty interest in remaining free from that confinement." *Fraizer v. Coughlin*, 81 F.3d 313, 317 (2d Cir. 1996).

In "conducting these individualized, factual inquiries, the Second Circuit . . . attends to the nature of the prisoner's confinement in relation to the 'ordinary prison conditions' and the length of time spent in confinement in the context of his total sentence." *Brooks v. DiFasi*, 112 F.3d 46, 48-49 (2d Cir. 1997).

In denying summary judgment, the court found it unnecessary to conclude that Tellier established that 522 days in ad seg gave rise to a liberty interest under *Sandin*. The court ruled instead that Tellier "sufficiently stated a due process claim" and "that material questions of fact remained unresolved" as to the conditions of his confinement and whether he has a liberty interest. See: *Tellier v. Scott*, 49 F.Supp.2d 607 (SDNY 1998). ■

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### Paper Wings

# Transsexual Prisoners Have Privacy Right

The U.S. court of appeals for the Second Circuit held that transsexual and HIV+ prisoners have a privacy right to confidentiality of their prison medical records and physical conditions. However, because this principle was not clearly established law, the defendants were entitled to qualified immunity on this, but not on the prisoner's Eighth Amendment claim.

In 1974, Dana Kimberly Devilla began a series of operations to change his sex from male to female. Seventeen years later, while in the custody of the New York State Department of Corrections (DOCS), Devilla tested positive for the HIV virus.

Later that year, while Devilla was confined to the Albion Correctional Facility (ACF), guard Jeffrey Lynch announced to several ACF prisoners and staff that Devilla had her sex changed and was HIV positive. As a result, Devilla claims that she was the target of harassment by guards and prisoners.

In a civil rights action, Devilla sued Lynch, another guard named Crowley, who was present when Lynch made the announcement, ACF superintendent Sunny Schriver, and DOCS commissioner Thomas Coughlin. She alleged the defendants violated her rights to privacy, life, liberty, due process, equal protection, and to be free from cruel and unusual punishment. She also asserted state law claims for negligent failure to care, intentional infliction of emotional distress, and violations of New York Corrections Law § 137(5), which prohibits "degrading treatment" of prisoners, and New York Public Health Law 2782(3), which affords prisoners a right to confidentiality of HIV status.

In 1995, Devilla died, but his executor was substituted and the case continued. By consent, the matter was tried before a magistrate judge, who dismissed the claims against Crowley and Coughlin during trial, along with several of Devilla's causes of action, including her Eighth Amendment claim on qualified immunity grounds. Ultimately, the jury was left with two questions: (1) did Lynch violate Devilla's constitutional right to privacy or § 2782(3) by revealing his HIV+ status and transsexualism, and (2) did

Schrive violate Devilla's right to privacy by failing to properly train Lynch.

Oddly, the jury returned a verdict in favor of Lynch, but against his supervisor, Schriver, awarding Devilla's estate \$5,000 in compensatory damages and \$25,000 in punitive damages. However, the trial court subsequently granted Schriver's motion for a directed verdict based on the inconsistent decision, and entered judgment in favor of all defendants.

On appeal, the panel addressed Devilla's right to privacy and Eighth Amendment claims separately. The privacy claim was analyzed in general terms, as it applies to prisoners, and under the doctrine of qualified immunity. In general, the court found *Doe v. City of New York*, 15 F.3d 264 (2nd Cir. 1994), had established that "[i]ndividuals who are infected with the HIV virus clearly possess a constitutional right to privacy regarding their condition." However, this decision does not necessarily apply to HIV+ or transsexual prisoners.

The court determined that transsexualism is a scientifically recognized medical condition. Based upon the reasoning of *Doe*, the court concluded that "the Constitution does indeed protect the right to maintain the confidentiality of one's transsexualism."

The court then noted that the right to privacy in prisons is circumscribed, and subject to "legitimate penological interests," as outlined in *Turner v. Safley*, 482 U.S. 78 (1987). Citing three cases from other circuits, the court recognized legitimate reasons for disclosure of prisoner HIV+ status. But the court was hard pressed to find circumstances that would justify disclosure of non-contagious conditions, such as transsexualism. In any event, the court concluded that "the gratuitous disclosure" of a prisoner's "confidential medical information as humor or gossip ... is not reasonably related to a legitimate penological interest." In this case, the revelation violated Devilla's constitutional right to privacy.

In deciding the qualified immunity issue, the court recognized that a prisoner's right to maintain the privacy of medical information was not clearly established on December 31, 1991, the date of Lynch's disclosure. Therefore, the court concluded the defendants were entitled to qualified immunity on this issue, and judgment in their favor was affirmed.

As to Devilla's Eighth Amendment claim, the court determined that "it was as obvious in 1991 as it is now that under certain circumstances the disclosure of an inmate's HIV-positive status—perhaps more so—her transsexualism could place that inmate in harm's way." As a result, the court determined that the defendants were not entitled to qualified immunity on this issue, and the case was remanded to the district court for further proceedings. See: *Powell v. Schriver*, 175 F.3d 107 (2nd Cir. 1999). ■

## Wilson Group

# Legal News

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## The New Bedlam

*by W. Wisely*

Gary Hahn walks his dog, tugging at the leash, back and forth on the hardpan track at Lancaster prison's maximum security D Facility in California. Right arm folded, fist crammed into the small of his back, Gary walks bent over, his curved spine and emaciated frame belying the muscular build of just a decade before. Eyes bloodshot, pupils pinned, they dart wildly back and forth beneath an angry tangle of graying hair. Gary raises a small commotion among other prisoners as he shuffles by, talking nonstop to his little dog. They snicker, point, and make faces behind his

back. That's because there's really no dog, no leash. Gary is psychotic.

Every morning, Gary gets out of bed and frenziedly beats his abdomen trying to kill the evil pig living beneath. He carries all of his important paperwork stuffed into the waistband of his jeans. Sometimes Gary forgets to shower. For weeks. When he leaves the dining table, he might suddenly spin about, walk back and rap his knuckles on the table three times, before making an exit. Gary carries on a rapid conversation as he walks, cursing loudly, sometimes spitting. He's talking to people only he can see. Gary is just one of an estimated 3,200 mentally ill people in California prisons. And they're driving the other 157,000 prisoners crazy.

The Pacific Research Institute, a San Francisco think tank, reported in 1996 that arresting, prosecuting, defending, jailing, imprisoning, and treating the mentally ill costs taxpayers between \$1.2 and \$1.8 billion a year. "Mentally ill inmates are not like typical prisoners. They are very labor-intensive," said Christine Ferry, director of mental health services at the Santa Clara County Department of Corrections, in the *San Jose Mercury News*. In prison, the insane are heavily sedated. Psychiatric medications are used not to cure or treat mental illness, but to make disturbed prisoners easier to manage.

In a classic example of ideology over good sense, former Governor Ronald Reagan cut the budget for state mental hospitals in half, forcing thousands of mentally ill people onto the streets. There they became victims of violent crime, drug

addicts, alcoholics, and criminals themselves. The number of mentally ill people in jail, prison, or on some form of supervised release from custody, dramatically increased as a result of Reagan's budget cuts. Rather than costing the public some \$17,000 to \$20,000 annually to treat in a psychiatric hospital, the mentally ill may cost \$50,000 a year to keep in the prison environment where their problems are largely ignored and often increased, and their impact on the health of other prisoners is decidedly negative.

The Department of Corrections diverted funds for the treatment of mental illness to cover ever increasing salaries for prison guards. In prison and jail, the mentally ill are often victimized both by other prisoners and staff either maliciously or for entertainment. Some insane prisoners are extremely violent, assaulting or stabbing prisoners and staff alike. Just being locked up in the same dorm, or same cell, with someone suffering from mental illness heaps added stress on the already full plates of prisoners without emotional problems. For those not afflicted with psychiatric problems, life in prison is enough in itself to wear away at their mental health.

Tank fills his days begging for coffee, cigarette papers, tobacco, and the use of a lighter. He gets out of bed in the morning, rolls a cigarette out of toilet paper, eats breakfast, and crawls back on his bunk to sleep. After three years in prison, he has no toothpaste, soap, or shampoo. Tank can fit all his wordly possessions in

## Inside

From the Editor	4
Pro Se Tips and Tactics	5
Wisconsin Prisoners Rebel	7
\$50,000 in Mental Illness Case	9
Attica Uprising Suit	12
Publication Reviews	14
Irish Political Prisoners	16
Civil Commitment	18
Illinois Phone Suit Dismissed	19
CO Prison Population Exploding	21
Washington Restitution Orders	23
News in Brief	26
U.S. Parole Commission	28

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## **New Bedlam (continued)**

a state lunch sack. Though family members live nearby, he doesn't get visits.

Tank has lived in every building on the yard. He spends an average of three to five weeks in one cell before his new cellie throws him out. He's indifferent about washing his hands, cleaning up after himself, or washing his clothes. Tank tries to get moved in with prisoners who have their own televisions or radios. He'll lay on his bunk watching television until three in the morning, it doesn't matter what's on. He never reads, has no goals, plans, hopes, or hustle. Although he's attempted suicide twice, is clinically depressed, in addition to the other mental health problems, Tank receives no treatment or psychiatric medication. Nor do the cellies he leaves in his wake with a bit more frustration, a bit more stress, and a little closer to their own mental point of no return.

I spent five weeks with Tank as my cellie. Every day, I felt myself slipping a bit deeper into depression just being around him. I couldn't turn the light on because he slept most of the day. He kept me awake watching my television because he didn't own an earphone. I'd come back after visiting all day to find him still lying on his bunk, dirt and food scraps on the floor, staring blankly at the ceiling. A sergeant asked me to let Tank stay in my cell "just for a few days until we find another place." His last cellie threw him out on the tier and refused to let him back into the cell. The few days turned into weeks. The housing unit guards wouldn't move Tank unless I found him a place to go. Since no one wanted him, that was impossible. I couldn't concentrate to write. I began to think of nothing other than getting rid of him.

Dr. Terry Kupers, a psychiatrist who's interviewed prisoners in segregated housing in several states, including California, said in *Lockdown America*, a book by Christian Parenti, "The psychotic inmates are unequivocally the most disturbed people I've ever seen. They scream and throw feces all over their cells. In a mental hospital you'd never see anything like that! Patients would be sedated or stabilized on drugs. Their psychosis would be interrupted." With little or no meaningful health care, the mentally ill

free-fall in an ever increasing maelstrom of madness. For those prisoners forced to live with and around the insane, the damage to their mental health seems inevitable especially given the absence of coping skills.

The majority of people in prison have histories of drug and alcohol use. Many are victims of sexual, emotional, and physical abuse. They don't enter the system with highly developed coping mechanisms, and they have little opportunity to develop any inside. Prisoners don't have the luxury of getting away from stress, of simply being alone to reflect and to think. Systems which give great consolation and hope to people outside, such as Yoga or Bhuddism, depend in large part on the ability to be alone for uninterrupted meditation and reflection. But, in the New Bedlam, prisoners are never alone. Not when they shower, sleep, or defecate. Someone is always watching. The constant bombardment of unrelenting stress takes its toll like a flurry of well placed punches on a tired boxer's head. As the Three Strikers and other lifers grow old in the political climate of no parole, the line of prisoners at the clinic window getting their Skittles will keep getting longer and longer.

"After about 15 years, prisoners suffer irreversible mental health damage from being in prison," said Dr. Anderson, a psychologist at Lancaster prison. Dr. Anderson pointed out that California prisons, in the post-rehabilitation age, are bleak, harsh, dangerously boring human warehouses. Add to all the usual worries and stress prisoners must face the apparently impossible task of staying sane and you merely shorten the journey to emotional meltdown. At Lancaster, there's a line of several hundred prisoners at the clinic window every evening. They're getting Skittles, psychiatric medication so-named because of all the pretty colors and shapes.

Bob, not his real name, looked like an ordinary citizen when he walked into the eight-man cell at Orange County jail. Well groomed, clean, wearing new eyeglasses and arrested for unpaid traffic tickets, he should've spent a few short hours in lock-up. He talked to the other men in the cell, moved to the front of the cell and watched the sunset through the narrow Plexiglas slits in the concrete outer wall. After several minutes, Bob gripped

the cell bars tightly, his knuckles popped and sweat rolled down his face.

Bob shook the bars so hard it sounded like rumbling thunder. Then he threw his head back and let out a piercing wail that chilled the spines of hardened convicts nearby. It took six men to pry his hands from the bars. Guards strapped him into a gurney and carted him to the rubber room, a padded cell in the jail's clinic area with a small hole on the floor for a toilet. There, he was stripped naked, strapped into a straight jacket, injected with Thorazine, and left drooling on the floor. Something along the process of being arrested, booked into the county jail, and housed in a cell was the last straw for Bob.

How long can a man, woman, or child maintain their own mental health when they live in an insane environment, surrounded by unbalanced people on both sides of the fence? "It disturbs me when I see someone I've known years ago, and now he's crazy," said James Christie, a 30 year-old prisoner at Corcoran. "I could choose to let go, to let prison, the guards, and life push me over the brink. But, I hang on, find ways to cope." Christie said guards and other prison staff are supposed to watch for, and report, warning signs of mental breakdown in prisoners. "But, they usually don't. More often, they provoke mentally ill prisoners for fun," he said.

"There was this one black guy in Corcoran SHU. He was on serious hot meds [psychiatric medication]. He tried to cut his dick off once. He shouted the menu out through his cell door every day," said Christie. "The guards would rack his cell door open and shut--bam, bam, bam--to set him off. At night, they'd shine flashlights from the control tower into the his cell until he started to bang his head against the wall and howl like a wounded animal." Segregated housing units--administrative segregation and Security Housing Units--are filled with mentally ill prisoners. Tortured, alone, suicidal and violent. Guards often mix the dangerously insane prisoners in with prisoner activists, writ-writers, or others they don't like.

Insane prisoners are tools, torture devices, used to either drive otherwise normal prisoners over the edge or spark a struggle. It's a win-win situation for the guards. Either the mentally ill prisoner

drives his cellie crazy, or provokes him to fight, thereby giving the guards an excuse to shoot their target. Sometimes the sane prisoner beats his demented cellmate, throws him out on the tier, and then gets a serious rule infraction. The mentally ill prisoners used in this game are seldom punished. Somehow, they sense they're free to act out with impunity.

"My name is Sin. I was put on earth to take on the sin for Mankind. I hold the key between this world and the other. Do you want me to unlock the door for you?" said the six foot, seven inch, gangly wraith standing in the center of my new cell in New Folsom's administrative segregation unit. Another jailhouse lawyer sent to the hole on drug charges, I knew what time it was: Sin was moved from cell to cell, section to section, and building to building in segregation. He was in the hole for a fight. When a guard saw the disturbance, hit his alarm, and ordered him to get down at gunpoint, Sin yelled, "Fuck you coward! You can't kill me! Shoot punk!"

The guard fired two shots from the military assault rifle. With every other prisoner lying face down on the yard, Sin stood, unscathed. Sin fought with every cellie he had. Officially, violent, disturbed prisoners are supposed to be on single-cell status. Unofficially, New Folsom guards knew exactly what they were doing. They wanted to provoke a fight, giving them an excuse to either shoot me or write me up for fighting. They refused to move either of us unless there was an incident, making the end inevitable.

Sin had nightmares. The ghosts of his father and uncle sexually assaulted him in his sleep. He sprang from his unmade bunk in the middle of the night swung his arms wildly, yelled, and spit at thin air. The staff, guards, counselor, medical assistants, knew Sin was gravely mentally ill. A danger to himself and others. Sin told me he belonged to the FFA, Fist Fuckers of America. He described how members competed to see how many inches up their rectum they could take a greased arm.

After three days without violence, a guard told Sin I killed his mother as we were released to the small, concrete segregation yard. The fight was brief. A rookie

gunner yelled a warning before firing. Sin was moved. Off to another cell, another prisoner chosen for special treatment, perhaps execution. "To get through the door to the other side," Sin confided, "you've got to die in this world."

The average person in prison, like the average person outside, never notices that many of their neighbors are insane. In prison, crazy people often look like just another convict. They have prison tattoos, smoke hand-rolled cigarettes, and drink instant coffee. They might make pruno, home-made wine, or chase drugs on the yard. The insane learn to mask their symptoms from the casual attention of others. But, in the relative safety of their own cells, the mask slips. It's in the close, unforgiving, confines of those concrete coffins that exposure to the mentally ill is most likely to adversely impact their cellmates.

Prisoners housed in maximum security facilities in California are in a constant state of movement from cell to cell, section to section, yard to yard, and prison to prison. Part of this movement is the department strategy to "keep the cons from getting comfortable," according to a Captain at Corcoran prison who declined to be identified. But, a big percentage of the moves are caused when normal prisoners simply can't put up with their mentally ill cellies any longer.

Diagnosed with psychosis, paranoia, and impulse control problems, James "Tank" Clem has been in and out of psychiatric hospitals since age 15. Living under bridges, in cardboard boxes, and abandoned cars outside, he used cocaine, heroin, and drank heavily. But, when he began to binge on crank, his mental illness became more pronounced. In a paranoid state, he shot and killed a fellow crankster after a night of slamming speed. Leaving a young wife and infant son to fend for themselves on the streets, Tank is serving 45 years to life for first degree murder at Corcoran prison.

He sometimes "naps" for 18 hours. An epileptic who suffers from frequent grand mal seizures, he regularly fails to wake up to get his medication. He knows when the seizure comes, he'll get a shot of Valium. ■

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## From the Editor

By Paul Wright

As the article in this issue mentions, *PLN* contributing writer Mark Cook was recently released from prison after 24 years. We wish Mark the best.

Former contributing writer O'Neil Stough was recently released from prison and, unfortunately, did not do very well as he committed suicide earlier this year. We offer our condolences to O'Neil's family and friends.

We greatly appreciate the contributions made by all of *PLN*'s contributing writers over the years. A number of people responded to my recent editorial asking for contributing writers. I'd like to thank those who responded. I believe I have replied to all who wrote. If not, write again because I was recently moved to a different prison on rather short notice and some papers did get misplaced in the shuffle.

However, we didn't get any responses or inquiries from women prisoners. We would very much like to have more contributions by women prisoners, especially on news issues that involve or affect women. If you are a woman prisoner with good writing skills and interested in writing news stories for *PLN* then please contact us.

We always welcome article submissions from all of our readers. If you have a prison or jail news story that *PLN* readers might be interested in, please send it along. For a copy of *PLN*'s writer's guidelines send an SASE.

One *PLN* project that I strongly feel is much needed, yet moving very slowly due to a lack of funding, is *PLN*'s website on the Internet. As the world moves into the digital information age, prisoners are largely being left behind. *PLN* would like to set up a prison litigation research site on the Internet that includes all back issues of *PLN*, direct links to the cases we have reported, a brief bank of motions and pleadings from winning cases, all pre-1990 (i.e. pre-*PLN*) prison and jail cases that are still good law, links to

other prison, law and criminal justice related websites and much more.

This would allow *PLN* to reach many more people around the world than we are currently able to reach with our print version. It would also make *PLN* much more useful as a research tool and information source. While prisoners would not have direct access to it, they could access it by proxy and have friends or relatives download the information, print and mail it to them.

As with most of *PLN*'s problems, this is one that can be resolved with money. Right now we have a group of volunteers working on some aspects of the website (downloading cases, converting files electronically, indexing files and cases, scanning case plugs, etc.) but there is only so much people working in their spare time can do when a big project is involved. Moreover, the people with the necessary technical skills tend not to have the spare time and the people with the time usually don't have the technical skills.

For the past two and half years or so, *PLN* has, without success, sought the \$40-50,000 in seed money that it will take to get the website fully operational. Foundation funders have not been receptive to the project. If you or anyone you know is able and interested in supporting this project please contact me at the address on page two for more details and information. Within six months or less of getting funding we can have the website up and running.

While reading a listing of law related websites in the *National Law Journal* it was disheartening to see that none were listed which are dedicated to prison and jail law, while every other area of law, no matter how obscure, is well represented. Hopefully we can change that.

Enjoy this issue of *PLN* and encourage others to subscribe. If you haven't made a donation to *PLN*'s matching grant campaign please do so. ■

## Riot at Private Prison

On November 14, 1999, hundreds of prisoners housed at a privately operated prison in Taft, California, rioted in protest over conditions, according to *The Bakersfield Californian*. Prisoners at the Wackenhut Corrections run facility broke windows, televisions, and furniture causing some \$60,000 in damage at the two year old prison in the state's Central Valley. The prison houses federal minimum and medium custody prisoners.

A special team of prison guards fired tear gas, rubber bullets, and sting grenades into a group of some 800 prisoners who refused to lock up in a protest about food and other conditions. Some 100 guards, including two 25-man special response teams, were called in to confront the prisoners. After the prisoners were gassed, they returned to their dorms. "That had the effect we intended," said Associate Warden Kevin Belt. Wackenhut downplayed the reasons for the protest, but prisoners had a different story.

Nathaniel Osuorji, responding to the one-sided newspaper coverage of the riot, wrote that Wackenhut's "prison for profit" at Taft was built only to make money, rather than providing basic services to prisoners. Osuorji said prison management lacked the "basic concept or regards for [prisoner's] rights." He points out that the Taft private prison offers no vocational, educational, or similar programs provided to the same classification of prisoners in government operated facilities. "Inmates are simply wasting away without gaining any of the special skills they will need for post-release survival," Osuorji said.

Wackenhut officials placed over 100 of the medium security prisoners in the Security Housing Unit for participating in the protest and riot. While praising "the excellent performance of our staff" in quelling the riot, Belt said some prisoners may be transferred to higher security prisons and lose good time or privileges. The rioting took place over a nine hour period, from about 2:00 p.m. to 11:00 p.m. Similar disturbances, some resulting in deaths or escapes, have plagued other privately operated prisons across the nation. ■

# Pro Se Tips and Tactics

## Supreme Court Decides Georgia Parole Case

by John Midgley

In many states, there are parole boards that decide when prisoners will be released. In these states, the timing of when the parole board will consider parole – the timing of “initial” parole consideration and the timing of later “reconsideration” of parole if parole has not been granted at initial consideration – is crucial: You can’t get parole unless the board is required to, or agrees to, consider whether you should be paroled.

Sometimes legislators or parole boards try to make longer the time in between parole considerations. For example, the law in a given state has been that the board must reconsider prisoners for parole every three years, but then that rule is changed to require reconsideration for parole only every five years.

Often prisoners claim that this type of change violates the constitutional ban on “ex post facto” laws. The Supreme Court has recently addressed this type of ex post facto challenge. In this column, I talk about what these decisions mean for how prisoners must plead and try to prove this type of ex post facto claim.

### 1. *Ex Post Facto And Changes In The Time Between Parole Consideration: “Significant Risk” Of Longer Incarceration*

Article I, § 10 of the United States Constitution prohibits states from passing ex post facto laws. “Ex post facto” means “after the fact.” This constitutional ban on ex post facto laws has been interpreted to prohibit states from passing laws that, among other things, make worse the punishment attached to a crime after the crime has been committed. *Collins v. Youngblood*, 497 U.S. 37, 43 (1990).

When states change the time between required parole reconsiderations, prisoners whose crime was committed before the change often claim this change is ex post facto. The prisoners reason that when there was more frequent parole consideration, there was more frequent parole, and so extending the time between reconsiderations eliminates an opportunity for release that was available when the crime was committed, and

this adds to the sentence. Courts have sometimes agreed with this argument. See: *Akins v. Snow*, 922 F.2d 1558 (11<sup>th</sup> Cir.), cert. denied, 501 U.S. 1260 (1991).

The Supreme Court has recently addressed this type of ex post facto claim. The Supreme Court has suggested that there may be some cases in which this kind of ex post facto claim might be successful, but the Court has made it considerably harder for a prisoner to win on this kind of claim than the 11<sup>th</sup> Circuit did in *Akins*. In two cases, the Court has placed on any prisoner who tries to show an ex post facto violation due to a change in frequency of parole consideration a burden of proof that there is a “significant risk” that the change increased that prisoner’s punishment.

In *California Department of Corrections v. Morales*, 514 U.S. 499 (1995) [PLN, July ‘95], the Court decided that adding time between parole reconsiderations for a narrowly-defined group of prisoners did not violate the ex post facto clause. At the time of Morales’ crime, California law required initial parole consideration at a set time (one year before a prisoner is first eligible for parole) and reconsiderations every year after that. But the law was changed after Morales’ offense to state that for anyone convicted of more than one murder, the parole board could delay reconsideration hearings up to three years if the board found it was unlikely that parole would be granted earlier. So, under the old law, Morales could have demanded reconsideration for parole every year, while under the new law he could demand reconsideration only every three years.

The Supreme Court held that Morales had not made out an ex post facto violation. The Court said that it was significant that the group of prisoners affected by the new law (conviction of more than one murder) was particularly unlikely to be easily paroled anyway, that the new law required the parole board to hold a hearing and find that parole was unlikely sooner than three years before reconsideration could be delayed up to three years, and that even after reconsideration had been set at three years the board probably could change that and see the

prisoner sooner. The Court also characterized the new law as being mostly about the “method” by which time in prison was determined, not about the length of time in prison.

Most significantly for this column, the Court majority in *Morales* put the burden on the prisoner making this kind of ex post facto claim to *prove* that the new law created a “sufficient risk” that his or her time in prison was increased by the new law. The two dissenting justices pointed out that it would be hard for prisoners to prove this, and said that the ex post facto clause should place the burden on the state to show that the new law did not create a risk of increasing prison time. The Court majority said instead that the burden of proof is on the prisoner, but did not say how a prisoner could meet this burden.

The Supreme Court looked again at this ex post facto issue very recently in *Garner v. Jones*, 120 S.Ct. 1362 (2000). In *Garner*, the 11<sup>th</sup> Circuit had looked again at its ruling in *Akins* that the Georgia parole board’s rule changing the time of required parole reconsideration for prisoners serving life maximum sentences from every three years to at least every eight years was an ex post facto violation. In *Garner*, the 11<sup>th</sup> Circuit said that even after *Morales* this change in mandatory parole reconsideration from three to eight years was ex post facto violation as it seemed “certain to ensure that some number of inmates will find the length of their incarceration extended in violation of the Ex Post Facto Clause...” *Jones v. Garner*, 164 F.3d 589, 595 (11<sup>th</sup> Cir. 1999).

The Supreme Court disagreed with the 11<sup>th</sup> Circuit that Jones had proven an ex post facto violation, but decided to give Jones another try to prove it. The Supreme Court found that the change in Georgia law did not on its face violate the ex post facto prohibition because reconsideration could occur sooner than eight years and even if an eight-year time was set, the board could change that and reconsider sooner. Next, the Supreme Court found that the 11<sup>th</sup> Circuit had just guessed that the new law must have lengthened incarceration for at least some prisoners, without proof that it would do so. The

## Pro Se Tips (continued)

Court said that instead prisoners must somehow show that a change in the frequency of reconsideration creates a "significant risk" of increased incarceration:

When the rule does not by its own terms show a significant risk, the [prisoner] must demonstrate, by evidence drawn from the rule's practical implementation by the agency charged with exercising discretion, that its retroactive application will result in a longer period of incarceration than under the earlier rule. 120 S.Ct. at 1370. The Supreme Court did not make a final decision, but sent the case back to the lower courts to give Jones a chance to prove that there is a "significant risk" that the change in frequency of reconsideration "will result in a longer period of incarceration."

### 2. Pleading And Proving "Significant Risk"

The first lesson of *Garner* is that if you plan to file a lawsuit on the ex post facto issue discussed in this column, make sure that you put in your complaint or petition what are now the elements of this kind of ex post facto claim:

- The law at the time of your crime (date the crime was committed, not sentencing date) provided for parole reconsideration every \_\_\_\_ years;
- The law was changed since your crime was committed to require parole reconsideration only every \_\_\_\_ years;
- This change creates a significant risk that you will spend a longer time in prison than you would have if the old law was still in effect.

The second lesson of *Garner* is that as soon as you file your case, you *must* ask for extensive discovery from the parole board about how the board has acted under the old parole reconsideration rules, and how the board has acted under the new parole reconsideration rules. You must ask for this discovery because without showing that under the old law some percentage of people in your crime category were paroled sooner than they likely would be under the new law, it will be hard to show "significant risk."

The Supreme Court in *Garner* stated that this kind of information would be necessary to show "significant risk," and gave some clues about what you should ask for. In the quote above from *Garner*, the Court talked about the necessity of the prisoner drawing on "the rule's practical implementation." 120 S.Ct. at 1370. In addition, the Court said:

"In the case before us, respondent must show that as applied to his own sentence, the law created a significant risk of increasing his punishment. This remains the issue in the case, *though the general operation of the Georgia parole system may produce relevant evidence and inform further analysis on this point.*"

120 S.Ct. at 1370 (emphasis added). The Court also discussed how a parole board's "policies and practices" can be relevant, and added "Absent a demonstration to the contrary, we presume the Board follows its statutory commands and internal policies in fulfilling its commitments." 120 S.Ct. at 1371.

Given these statements from *Garner*, you should ask for at least the following categories of discovery from the parole board:

- Statistics on when all people sentenced for your crime were paroled under the old rules;
- Statistics on when all people sentenced for your crime have been paroled under the new rules;
- Information on how often and under what circumstances prisoners have been given earlier consideration under the new rules (that is, how often has the board decided to reconsider sooner than is required under the new law).

With the first two categories of information, you may be able to show a pattern suggesting longer actual times in prison for some or many prisoners under the new rules. With the third category of information, you may be able to show that the parole board only rarely grants reconsideration earlier than is required by the new law. If you can show this, you can then tell the court that the theoretical availability of earlier reconsideration is not available in practice, and so does not mitigate the significant risk of longer terms created by the actual implementation of the new law.

In order to get this crucial information, you should use the tools available

to you for discovery. If you have filed a § 1983 case on your claim (as Jones did), I suggest a combination of interrogatories (Federal Rule of Civil Procedure 33) and requests for production of documents (Rule 34) requesting all information in the above categories. If you have filed a habeas corpus petition (as Morales did), you will have to ask the court to permit you to conduct discovery (Rule 6 of the Rules Governing Section 2254 Cases in the United States District Courts). Given what *Garner* says, you should be able to persuade a habeas court to allow you to get information to try to prove your claim.

If you have a choice (meaning you haven't started yet), it would be better to file your case as a § 1983, because discovery rights are clearer and you will not have to go through the state court system first. In the past, questions have been raised about whether § 1983 or habeas (which does require going through the state system first) is the proper way to proceed. Given that in *Garner v. Jones* the prisoner used § 1983 without comment from the Supreme Court, I think you have a good argument that § 1983 is a proper way to proceed. See also *Akins v. Snow*, 922 F.2d at 1559, footnote 2.

If the parole board resists discovery on these topics, you should ask the court through local motion procedures to order the board to give you the information. *Garner* makes it very clear that board practices and parole rates are now relevant to the ex post facto determination. See the quotes above. (In *Garner*, the Georgia parole board did resist discovery, and the district court would not order the board to produce the information. Given what the Supreme Court said before remanding the case, it is unlikely a district court could now refuse to require reasonable discovery about board practices and statistics.)

Issues of discovery and proof are complicated. This column contains general information and is not intended to provide advice for your case. You should do your own research based on the facts of your case. ■

[John Midgley is an attorney with Columbia Legal Services in Seattle.]

# Wisconsin Prisoners Rebel at Private Tennessee Prison

On November 30, 1999, Wisconsin state prison officials were touring the Whiteville Correctional Facility (WCF) in Tennessee. The prison is operated by Corrections Corporation of America (CCA) and houses 1,500 Wisconsin prisoners.

Just minutes after WCF warden Percy Pitzer led an entourage headed by Wisconsin corrections chief Jon Litscher through the prison's dining hall, about 50 Wisconsin prisoners took 15 CCA kitchen workers hostage and seized control of the chow hall.

SORTs, Special Operations Response Teams, from two nearby CCA prisons joined the WCF SORT team in quelling the disturbance. Also involved were members of the Whiteville and Bolivar police departments, and Hardeman County Sheriff's deputies. Although not directly involved in retaking the prison, the Tennessee Highway Patrol had eight cars at the scene, and its Special operations Division was on standby. After a two-hour standoff, the police and SORT teams stormed and retook the prison using tear gas.

"We were hoping we could outwait them and get them to calm down," Whiteville Police Chief Billy Henson told the (Memphis) *Commercial Appeal*. "But then they started beating some of the staff."

Warden Pitzer downplayed the damage to the facility. But police chief Henson said the dining hall was badly damaged.

"They took over the whole kitchen area and tore it up pretty bad," said Henson. "They had poured soap on the floors so when we came in, we were slipping."

Litscher dismissed the notion that the uprising was tied to his visit. "I was in that kitchen 15 minutes before this thing went down," he told the *Milwaukee Journal Sentinel*. "If something was going to happen that was planned, what better time to do it than then? I think it was spontaneous. There was a golden opportunity 15 minutes earlier to do something really dramatic, if they were planning a show-and-tell."

Wisconsin prisoners housed at WCF provided *PLN* with the answer to Litscher's question about timing: "When

visitors from the Wisconsin DOC and CCA were visiting the main inmate dining hall," one WCF prisoner told *PLN*, "the inmates from K-Pod (who are known snitches and brown nosers) were being fed in the inmate dining room, and I believe that [CCA officials] timed their tour of the dining hall to coincide with the feeding of K-Pod inmates."

Another WCF prisoner told *PLN* the riot was pre-planned and definitely was timed to draw maximum attention from Wisconsin prison officials: "They had a plan to seriously attempt to make favorable changes by rioting, but with only 40 to 50 inmates that were involved [in the uprising], their quest failed," wrote one prisoner. "The inmates who planned the riot did not really intend to cause serious harm to anybody... all they wanted was better medical treatment, better food, better visiting conditions, and better inmate pay for work performed."

Numerous WCF prisoners have written to *PLN* with complaints about conditions at the for-profit prison: "This prison is seriously understaffed," writes one prisoner. "The people working here are not trained properly. How can you give a person some classroom training and a little on the job training and expect them to guard seasoned criminals? We were told that this was a medium security facility. It certainly did not turn out to be that. We don't go to the dining hall any more. They open one gate at a time in the hallways. We are being punished because they don't have enough guards to handle any situation which may arise."

"They are way understaffed," another WCF prisoner wrote to *PLN*, "so they don't want too many inmates in one spot at a time [so] they cut our rec time by two hours a day because they only let one unit out [at a time]."

Wisconsin prisoners exiled in the Tennessee for-profit prison also complain of higher commissary prices, lower pay, outrageously high long distance phone rates, and poor medical care.

"If you have some serious health problems," says a WCF prisoner, "you don't want to be down here. They are way under staffed and under paid, so a lot

of them quit when they get some experience."

There have also been numerous well documented instances of guard brutality at WCF. Wisconsin prisoners were beaten and systematically tortured over a four-day period in August of 1998 after a WCF guard, was stabbed during an altercation, according to a lawsuit filed by WCF prisoners.

Prisoners say stun gains were used on their genitals and they were doused with pepper spray, had their heads slammed against walls, and at least one prisoner claims to have been sodomized by guards using a shampoo bottle.

Wisconsin prisoners say they were taunted with a sick sort of Southern hospitality. "They started beating me with their fists, hitting me in my ribs and alongside my head," wrote one prisoner. "As they did this, one of them said, 'Do you know where you're at? You're not in Wisconsin boy! You're in fucking Tennessee. We do things different down here.'"

Martin Luther King observed that "riot is the voice of the unheard." The November 30 riot by Wisconsin prisoners exiled to WCF is a case in point.

"We kept bringing these problems up to the administration," said a WCF prisoner, "But they don't listen to us because profits come before anything."

And Wisconsin prison officials don't want to listen either. With thousands of prisoners warehoused in for-profit out-of-state lockups, Wisconsin officials don't want to admit that their policy of exporting prisoners is a failure. Attorney Terry Williams, who represents Wisconsin prisoners in a pending lawsuit, sums it up nicely.

"It seems like they're trying to put the best spin on this so that they can keep on sending prisoners out of state," Williams told the *Journal Sentinel*. "They've got a terrible problem -- if there's a clamor to return inmates [to Wisconsin], there's no place to put them." ■

Sources: *Memphis Commercial Appeal*, *Milwaukee Journal Sentinel*, *Bolivar (TN) Bulletin-Times*, Reader Mail

## Defiant Texas Death Row Activist Executed

On March 15, 2000, the state of Texas killed Kamau (Ponchai) Wilkerson. He proved to be a fighter to the end.

Kamau was among seven Texas death row prisoners who stunned the world with a bold escape attempt on Thanksgiving Day 1998 [See: Daring Death Row Escape Shakes Up Texas, *PLN*, April '99]. In reaction to that incident (one of the seven actually escaped but later drowned in a creek about a mile from the prison), Texas prison officials instituted harsh reprisals. One of the changes involved relocating death row from the old Huntsville prison to a newer high-tech supermax prison, the Terrell Unit, near Livingston, Texas [See: Texas Death Row Hunger Strike, *PLN*, April '00].

On February 21, Kamau Wilkerson and Howard Guidry (another participant in the 1998 Thanksgiving Day escape attempt) took a Terrell Unit guard hostage and held her for nearly 13 hours. Prison officials said the guard, 57-year-old Jeanette Bledsoe, was escorting Guidry back to his cell at about 4:15 p.m. when she was overpowered by Wilkerson who had somehow managed to jimmy his cell door open.

Bledsoe was taken to a small cage-like room adjacent to death row and placed on the floor with one leg shackled. Officials said one of the hostage-takers was armed with a makeshift knife and the other had a 2-foot-long piece of metal used to open the food slot on each prison cell. Security camera footage showed that Guidry and Wilkerson treated their hostage with respect, a prison spokesman said.

The hostage-takers demanded to meet with community anti-death penalty activists. They were allowed to talk with Njeri Shakur of the Texas Death Penalty Abolition Movement, Deloyd Parker of Shape Community Center and Kofi Tahara of the National Black United Front.

After meeting with the delegation and airing their demands (improved conditions of confinement for death row prisoners and a moratorium on executions) Wilkerson and Guidry surrendered to authorities at about 5 a.m.

Bledsoe, who was released unharmed, underwent a routine examination at the prison infirmary. She had been work-

ing as a prison guard for three years and has a son who is also a guard at the Terrell Unit.

Guidry and Wilkerson, both members of the death-row movement Panthers United for Revolutionary Education (PURE) were placed on 24-hour lockdown status, along with other death row prisoners who were charged by the warden with "communicating with two Black offenders" and "hampering negotiations in a hostage situation." Four weeks later, the lockdown was still in place the day the state of Texas came to kill a defiant Kamau.

"I will not cooperate with your act of murder," Kamau told Warden Robert Treon March 15th when asked about a last meal.

Kamau refused to eat a last meal. He also declined to sign papers requesting family, friends or a spiritual advisor to view his execution. He refused to sign away his remains or cooperate in any way with the government executioners' "standard procedures."

When guards came to transport him from the Terrell Unit in Livingston to the Huntsville death house, Kamau refused

### My Statement in Response to the State

by Kamau "Ponchai" Wilkerson

*[The following is an excerpt from "My Statement in Response to the Setting of an Execution Date and the State of Texas' Plan to Murder Me," by Ponchai Kamau Wilkerson]*

The 13th Amendment abolished slavery "...except as punishment for crime whereof the party shall have been duly convicted." Slavery has never ended; prison slavery is legal. The mentality of the Confederacy still exists and persists today in Texas, especially among its lawmakers and its law enforcement system, the courts, prisons, and police.

My participation [in this execution] would be an insult to the working, oppressed class -- the underclass -- who know and understand the political nature of the death penalty and therefore work to bring it to an end. An insult to the citizens of this young country who would like for it to grow, mature and prosper, and to do away with such things as the death penalty that prevent this, but who cannot because of the stranglehold its greedy capitalist rulers have over it.

Those privileged few own and control all of the wealth and means of production and distribution and, therefore, dictate the lives and control the minds of the masses. (Do the citizens of this country support this system because they believe in it, or

because they fear the consequences of not supporting it?)

Because I understand that this country is governed by a ruthless system of white supremacy -- of capitalism -- of patriarchy -- that so viciously and violently terrorizes its citizens into submission and conformity, I will not participate in the process of this planned murder. There was nothing honorable or just or noble about the way I was convicted or sentenced. This case is not even a capital murder case. There was much prosecutorial misconduct and investigative misbehavior. A lot of dirt got slung around and swept under the hem of the judge's robe in the courtroom.

I am one who knows that the things that went on in the courtroom and during the investigation were all wrong. As a result of those wrongs, the things that have happened to me since are wrong. I am one who knows that I have been wronged. This is not justice; it is a mockery of it. It is an insult even to the victim's family, which has been deceived. I will not contribute further to this injustice. I will continue to fight. I will not participate in the process of this planned murder.

Source: *Revolutionary Worker*

to leave his cell. A "goon squad" was called to subdue him. They gassed him with pepper spray and hog-tied him with chains.

Guards had to use "additional restraints" to bind Kamau to the death house gurney. The warden asked if he had a final statement: "This is not a capital case," Kamau replied.

When the lethal mix of chemicals started pumping into his veins, Kamau unveiled a final surprise for his captors and executioners. In one last act of rebellion and defiance, the 28-year-old revolutionary, organizer and death-row activist stunned observers by spitting a small handcuff key out of his mouth.

"The secret, as of Wilkerson," he whispered.

He was pronounced dead at 6:24 p.m. He was the 210th person to be killed by the Texas Death machine since the death penalty was reinstated in 1976, and the 123rd to die on presidential candidate G.W. Bush's watch as Texas governor. ■

Sources: *Workers World, Associated Press, New York Times*

## **\$59,177 in Damages and Fees Awarded in Georgia Braille Suit**

On April 15, 1999, a federal district court in Georgia issued a directed verdict awarding a blind Georgia state prisoner \$2,000 in damages. Eddy Stephens, a blind prisoner, was denied access to braille books and writing instruments. He was also not allowed to take prison vocational courses due to his disability.

Stephens filed suit claiming that these denials violated his rights under the Americans with Disabilities Act (ADA). The case went to trial and the court granted a directed verdict in favor of Stephens on the denial of vocational courses and braille books. The court awarded Stephens \$2,000 in damages and \$57,177 in attorney fees and costs. The jury ruled in favor of the defendant prison officials on the denial of the braille writing instruments. The defendants have appealed the verdict to the Eleventh circuit. See: *Stephens v. Ault*, US DC GA, Case No. 194-CV-2328-GET. ■

Source: *Georgia Trial Reporter*

## **New York Prisoner Wins \$50,000 In Failure To Treat Mental Illness Suit**

by *Matthew T. Clarke*

A federal district court in New York has held that officials of the New York Department of Correctional Services (DOCS) subjected a prisoner to cruel and unusual punishment through their deficient treatment of his mental illness and by the brutal conditions under which he was incarcerated.

Anthony Perri, a mentally ill New York state prisoner, was assisted by the Prisoner Legal Services of New York in filing suit against Thomas A. Coughlin, Commissioner of DOCS and Richard Surles, Commissioner of Mental Health, alleging that their failure to properly treat his mental illness and the barbaric conditions of his confinement while incarcerated in the Observation Unit (OBS) of the Special Housing Unit in Clinton Correctional Facility constituted cruel and unusual punishment.

While at OBS, Perri was held unclothed and without a mattress, blanket or bedding in a cell containing only a sink and toilet which was brightly lit twenty-four hours a day. The only window (other than the one in the solid cell door) was very small and could only be operated by guards. When the window was opened, Perri's complaints of being cold were ignored for hours. He was denied personal property, hygienic supplies, legal materials, writing materials, and mail. He developed body sores.

By design, there was no opportunity for contact between prisoners at OBS. There were no programs, recreation, or group therapy. Perri was only permitted to leave the cell twice a week for showers or to go to a visit.

After months of this treatment, Perri smeared feces and urine all over himself and his cell and refused solid foods. He was transferred to another OBS cell. Three weeks later, he attempted suicide, severing an artery among other injuries. He was then transferred to Central New York Psychiatric Center (CNYPC), but was returned to the same conditions in Clinton's OBS only nine days later,

even though he still showed signs of mental illness.

After two more months in OBS, Perri destroyed his cell's sink and toilet. For this he was handcuffed, shackled and kicked in the rectum, causing severe pain. He twice attempted to hang himself. Both times, staff let him hang until he was unconscious. Finally, he was again transferred to CNYPC. A month later, he was transferred to Sing Sing Correctional Facility. There he stabilized.

Perri claimed that he received inadequate care at CNYPC because it lacked the facilities for long term intensive care. Therefore, he was repeatedly compelled to face the inhumanity of cell life at OBS.

The defendants claimed there was no proof of their personal involvement in Perri's ordeal or treatment, therefore they were entitled to qualified immunity. The court held that New York Correction Law § 401 affixed responsibility for prisoners' mental health treatment on the defendants, and they could not dodge that statutory responsibility by claiming a lack of personal involvement.

Experts had testified to the inhumane conditions at OBS and the policy of reducing expenses by transferring prisoners from CNYPC quickly. The responsibility for Perri's (mis)treatment was therefore the defendants'.

The court stated it "had great difficulty agreeing that prison authorities may not be deliberately indifferent to an inmate's current health problem but may ignore a condition of confinement that is sure or very likely to be the cause of serious illness and needless suffering."

Therefore, the court awarded Perri \$50,000 in compensatory damages, statutory costs, disbursements, and attorney fees. The defendants did not appeal. The ruling is unpublished. See: *Perri v. Coughlin*, 1999 WL 395374 (N.D.N.Y. 1999). ■

# Contradictory Disciplinary Hearing Evidence Not Precluded From Use of Excessive Force Suit

By Ronald Young

The U.S. district court for the Eastern District of California held that a prisoner was not precluded from introducing evidence contradicting factual findings of disciplinary proceeding instituted against prisoner as a result of incident.

Vincent Marquez, a California state prisoner, brought a 42 U.S.C. § 1983 civil action against R.J. Gutierrez, a California Department of Corrections prison guard. "It is undisputed that during a prison-yard melee at California State Prison-Sacramento" Gutierrez shot Marquez in the leg with a rifle. The bullet wound caused considerable tissue and bone damage. In his suit, Marquez asserted that Gutierrez employed excessive force when he shot him, "thereby subjecting him to cruel and unusual punishment in violation of the Eighth Amendment ...."

Marquez indicated in pretrial declarations that he intended to "introduce evidence that he was an innocent bystander during the scuffle, or that, to the extent he was physically engaged, it was in self-defense. Marquez maintained "that the firing of lethal ammunition at an unarmed prisoner was unjustified, even if he was culpable of battery prior to the shooting."

In preparation for trial, Gutierrez "filed a motion *in limine* seeking an order prohibiting Marquez from introducing evidence which would contradict the findings of" a prison disciplinary hearing on the matter. Based upon a disciplinary report on the incident (called a "115") filed by Gutierrez, it was found at this disciplinary hearing that Marquez had committed battery against another prisoner named Perez. Marquez was unable to interrogate Gutierrez at the hearing, since the guard was on administrative leave at the time. And a third witness, who claimed he was the one who kicked Perez and denied Marquez had anything to do with it, was disregarded by the disciplinary hearing officer.

Gutierrez argued that *Heck v. Humphrey*, 512 U.S. 477, 114 S.Ct. 2364(1994), and *Edwards v. Balisok*, 520

U.S. 641, 117 S.Ct. 1584 (1997), compelled the court to issue an order excluding such evidence, and even went so far as to say that under *Heck/Balisok* the entire action should be dismissed.

According to the court, Marquez's action "is distinguishable from *Heck* and *Balisok*" because Marquez "does not challenge the constitutionality of any relevant process, whether that accorded in his original conviction or in the disciplinary hearing." Marquez also was not seeking compensation for lost good-time or for time spent in the SHU. The court found that nothing about Marquez's claim "challenges, directly or indirectly, the constitutionality of the disciplinary conviction." An "attack on the evidence relied on in the administrative hearing, however, is not an attack on the adequacy of the process accorded him at the disciplinary proceeding."

"Put directly, while plaintiff's proposed evidence disputes defendant's report, plaintiff does not seek 'damages for ... harm caused by actions whose unlawfulness would render a conviction or sentence invalid.' .... In the broadest sense then, a jury finding in favor of plaintiff in the matter at bar would not necessarily imply the invalidity of his disciplinary conviction. In sum," the court stated, "the *Heck/Balisok* doctrine does not bar (Marquez's) §1983 claim for excessive force, and also that, contrary to defendant's contention, it is irrelevant to the admissibility of evidence in this suit."

The court went on to address the issue presented by Gutierrez's motion as to whether Marquez should be precluded from introducing evidence contradicting the "115" report upon which the disciplinary hearing officer relied, and also whether collateral estoppel precludes Marquez from presenting such evidence.

"Assuming a full and fair opportunity to litigate, federal courts must accord preclusive effect to state court judgments. (Citations omitted). Both issue preclusion (collateral estoppel)

and claim preclusion (*res judicata*) apply to actions under 42 U.S.C. § 1983. State law determines the preclusive effect of previous state proceedings. (Citations omitted). Federal courts will give preclusive effect to fact finding by state agencies acting in a judicial capacity when the parties have had a full and fair opportunity to litigate those issues, and when state law so requires. See: *University of Tennessee v. Elliott*, 478 U.S. 788, 106 S.Ct. 3220 (1986).

"Issue preclusion prevents relitigation of all 'issues of fact or law that were actually litigated and necessarily decided' in a prior proceeding." Under California law, an issue is precluded if (1) the issue decided in the prior adjudication is identical to the issue presented in the second case; (2) there was a final judgement on the merits; and (3,) the party against who estoppel is asserted was a party to the prior adjudication."

Also under California law, "an administrative agency decision has the same preclusive effect as a state court decision if the procedures used to render the decision satisfy three requirements: (1) that the administrative agency acted in a judicial capacity; (2) that the administrative agency resolved disputed issues of fact properly before it; and (3) that the parties had an adequate opportunity to litigate."

"California courts have concluded that prison disciplinary hearings do not satisfy" the judicial capacity requirement. The court concluded that absent an agency acting in a judicial capacity, the court could not give preclusive effect to its findings. Thus, in this case, Marquez could "not be precluded (under collateral estoppel) from litigating the issue of his culpability in the prisonyard melee. The court denied Gutierrez's motion to preclude evidence contradicting the findings of the hearing officer in the disciplinary case, certified an interlocutory appeal, and stayed the proceedings until further order. See: *Marquez v. Gutierrez*, 51 F.Supp.2d 1020 (E.D. Cal. 1999). ■

## Retaliation Claim Requires Trial

The court of appeals for the Eighth circuit held that a trial was required to determine if a prisoner was retaliated against for exercising his right to religious freedom. The court also held that prisoners have no right to encourage other prisoners to file grievances or lawsuits and that an equal protection claim will fail unless the plaintiff can identify who he claims to be similarly situated to.

Howard Dean Rouse is an Iowa state prisoner who requested a transfer to a Minnesota prison in order to practice his Native American religion. He is also a snitch. In 1993 Rouse was duly transferred to the Minnesota Correctional Facility (MCF) in Stillwater. While at MCF, Rouse complained about the religious programs available and ghostwrote grievances for other prisoners on religious issues. In 1994 Rouse stated he was unhappy at MCF and Timothy Lanz, Rouse's unit director, requested Rouse's transfer back to Iowa.

In the meantime, prison officials discovered Rouse was involved in a prisoner drug smuggling and money laundering operation. In exchange for immunity from prosecution, Rouse agreed to testify against his fellow conspirators. To ensure Rouse was available to testify, Lanz withdrew the transfer request. Apparently after Rouse was no longer needed by prosecutors Lanz reinstated the transfer request, citing as a reason Rouse's activities encouraging Native American prisoners to file lawsuits and grievances on religious issues. Rouse then filed suit claiming his transfer back to Iowa was in retaliation for the exercise of his right to file lawsuits and grievances over the purported denial of his right to religious freedom. The district court granted the defendants' motion for summary judgment holding prisoners have no right to be in any given prison and can be transferred for any reason or no reason at all. The court of appeals reversed and remanded the case for a trial.

The appeals court held that Rouse had presented sufficient evidence that his transfer was in retaliation for the exercise of his rights to free speech and the free exercise of religion. Prisoners have no right to be, or remain, in any given prison or state prison system. However,

prisoners cannot be transferred in retaliation for the exercise of their constitutional rights. See: *Goff v. Burton*, 91 F.3d 1188 (8th Cir. 1996).

"To successfully argue retaliatory transfer in violation of his constitutional rights pursuant to § 1983, Rouse 'must prove that a desire to retaliate was the actual motivating factor behind the transfer ....' In other words, Rouse must prove that but for his protected First Amendment activity he would not have been transferred." On appeal, reviewing courts need only find that a reasonable jury could rule that "but for" the constitutionally protected activity, the plaintiff would not have been transferred.

The court held that Rouse had presented sufficient evidence to meet this test. The court noted that in the first memo seeking Rouse's transfer, Lanz referred only to Rouse's activities involving grievances and lawsuits over religious issues. "A reasonable jury could find that the reasons for Rouse's transfer are contained in these two sentences, and that all other rationales given by prison officials were merely post hoc responses to anticipated challenges to the transfer. Assuming a reasonable jury could so find, we must ask a further question: could a reasonable jury also find that the reasons set forth in Lanz's September memorandum are improper and that Rouse was transferred in retaliation for his exercise of constitutional rights? We answer both parts of this question in the affirmative."

The court noted that if the true reason for the transfer was Rouse inciting prisoners to file grievances or assisting them with lawsuits, then the transfer was proper. [The court did not note that the supreme court and other circuit courts have held prisoners have a constitutional right to assist each other in litigation.] However, the court noted there was little evidence in the record that more than one grievance on religious issues had been filed at MCF by anyone other than Rouse, further, all the defendants but one denied all knowledge of a lawsuit Rouse claimed to have assisted in drafting. "Therefore, a reasonable jury could infer that Rouse was actually transferred in retaliation for his own religiously motivated grievances. And while an inmate may be transferred for filing frivolous or repetitive griev-

ances,... a reasonable jury could further find that Rouse's grievances were neither frivolous nor repetitive, and that Rouse was actually transferred in retaliation for his attempts to exercise his First amendment right to practice his Lakota religion." The retaliation claim was remanded for trial.

The court affirmed dismissal of Rouse's equal protection claim. This claim failed because Rouse never identified the class to which he claimed he was similarly situated to but treated differently. The court affirmed dismissal of the conspiracy and religious rights claims as Rouse produced no evidence to support them. The court noted it was not deciding any PLRA or immunity issues in this case as they had not yet been raised in the district court. See: *Rouse v. Benson*, 193 F.3d 936 (8th Cir. 1999). ■

### \$15,000 Awarded to Ohio Prisoner Beaten by Guards

On July 2, 1999, a federal jury in Columbus, Ohio, awarded Ohio prisoner James Morrison 115,000 in damages. Morrison filed suit claiming he was taken to a secluded area of a prison (unnamed in reports), where he was beaten and kicked by guards Karl Davis, Jeffrey Felts and Charles Adams. As a result, Morrison suffered bruises and abrasions and was hospitalized for several days.

Morrison was later placed in administrative segregation for four months. One of the guards who beat him later quit and another was suspended for one day.

At trial Morrison presented evidence that he was victimized because the assailant guards wanted to teach other prisoners not to "disrespect" guards.

The jury awarded Morrison \$12,000 in compensatory damages for pain and suffering and \$3,000 in punitive damages. See: *Morrison v. Davis*, US DC, Ohio, Columbus Division, Case No. C2-97-1305.

Source: *Ohio Trial Reporter*

# Attica Uprising Verdict Reversed

The Second Circuit Court of Appeals added insult to brutal injury when it overturned two jury awards - totaling \$4 million and \$75,000 - stemming from the murder of 39 people and the torture of hundreds of prisoners immediately following the 1971 Attica riot. Holding that bifurcation of the liability and damages phases of the trial violated the Seventh Amendment and that the liability jury's verdict failed to establish class-wide liability, the court remanded the case to the district court.

On September 9, 1971, a riot erupted at the Attica Correctional Facility and prisoners quickly seized control of the prison, taking 49 hostages. Guards regained control of portions of the prison that day and 11 hostages were released. But prisoners retained control of parts of the prison for several days as attempts were made to negotiate an end to the uprising and the release of the remaining hostages.

On September 13, 1971, negotiations broke down and authorities stormed the prison under a cloud of tear gas, firing more than 2,000 rounds and reclaiming control in just six bloody minutes of murder and mayhem. When the smoke cleared, 10 hostages and 29 prisoners had been slaughtered and another 3 hostages and 85 prisoners had been wounded by gunfire - 83 of whom were injured seriously enough to require surgery.

No prisoner was spared from what the court described as the orgy of brutality that began immediately after order was restored and continued for several days, as guards viciously retaliated, torturing and beating prisoners.

Prisoner Frank Smith was forced to lie naked on a table for several hours, with a football under his chin while guards beat and burned him. He was warned that he would be castrated or killed if the ball fell. Smith was then forced, barefoot across broken glass, through a gauntlet of guards who beat him with clubs as he staggered past. Afterwards, Smith was dumped into a cell and forced to lay spread-eagled as guards tormented him with a gun, playing Russian roulette.

There were also countless random acts of violence against prisoners. One prisoner who had two fractured femurs was dumped from a gurney. He was ordered to crawl back to his cell but was

unable to do so. Guards then repeatedly shoved a screwdriver into his anus.

Prisoners filed suit in 1974 and the district court certified the case as a class-action and bifurcated the trial into liability and damages phases. But the case languished as defendants did all they could - often with the court's consent - to delay resolution, preventing the case from reaching trial until 1991.

One of the defendants, former Assistant Deputy Superintendent Karl Pfeil, was specifically responsible for preventing acts of retaliation following the retaking. He was sued for failing to prevent, and for actually condoning, the acts of retaliation that occurred.

The liability jury returned a verdict against Pfeil and, after several more delays, damages trial for plaintiffs Smith and David Brosig were held in 1997. Smith represented the high end of the range of damages an individual plaintiff could expect because he was possibly the most

brutalized plaintiff. Brosig represented the majority of class-members who were not singled out for extra retaliation or seriously injured. Ultimately, the damages juries awarded Smith \$4 million and Brosig, \$75,000, [PLN, Nov. 97], and Pfeil appealed.

The Court of Appeals rejected Pfeil's argument that the district court erred in applying the Eighth Amendment deliberate indifference standard rather than the sadistic and malicious standard announced in *Hudson v. McNillian*, 503 U.S. 1, 112 S.Ct. 995 (1992). The court held that the *Hudson* standard makes little sense in the context of supervisory liability based upon failing to remedy a known wrong or being grossly negligent in managing subordinates who caused the unlawful act or event.

The court reversed the liability and damages jury's verdicts on two grounds. First, the court held that the verdict sheet in the liability trial failed to establish

## Attica Suit Settled for \$12 Million

On February 15, 2000, a federal judge approved a settlement in which New York State is to pay \$8 million to the prisoners who were beaten and tortured after the 1971 Attica riot, closing one of the longest, ugliest chapters in criminal justice history. The settlement provides an additional \$4 million for legal fees, and is believed to be the largest ever in a prisoners' rights case.

The settlement falls far short of the \$2.8 billion the plaintiffs originally sought. But the Attica survivors don't seem to mind. "There's no way in the world that what each of us went through can have a monetary value," said former prisoner Gary Haynes. "Is it worth \$1? Is it worth \$10 million? It's been 28 years and its time to end. It's time to end." Frank Smith, one of the most brutalized plaintiffs, echoed this sentiment, saying: "Anybody can feel bad about what happened at Attica, but there's no amount of money that can compensate."

For the plaintiffs who never abandoned the fight, the issue wasn't about

money. It was about holding the government accountable for brutally murdering 39 people and seriously wounding more than 80 more through vicious acts of retaliation and excessive force. Yet, under the terms of the settlement, the state is not required to admit any liability or wrongdoing in the bloodiest prison massacre in American history.

It is expected that perhaps 500 former and current prisoners and survivors of deceased prisoners will file claims seeking a portion of the settlement. The allocation of the \$8 million will be based on the severity of the prisoners' injuries and awards are expected to vary widely. But the average could be about \$20,000 per prisoner.

"As in any compromise, this should not and cannot be viewed as a clear victory for either side," said the judge who approved the settlement. "The continuing recriminations of who's right and who's wrong - I will leave that to history."

class-wide liability. The court noted that it was not clear what issues were to be established, and concluded that the verdict sheet was insufficient to establish Pfeil's liability to the entire class or even to particular plaintiffs who suffered injury from a reprisal. Second, the court held that bifurcation violated the Seventh Amendment because the liability and damages juries were asked to determine whether the same acts constituted reprisals, creating the likelihood that the juries would find different acts to be reprisals.

The court also questioned the wisdom of certifying the case as a class-action, concluding that the district court's perception of common issues was

a vast oversimplification because the case bristled with individual issues. The court also observed that the benefits anticipated from a liability trial involving the class were illusory.

In the end, the court criticized the defendant's delay tactics as a strategy that can no longer be tolerated and instructed the district court to give the case expedited treatment on remand. Yet, the court's own decision ironically delayed and thereby denied justice once again. Twenty-eight years after the riot, the case was no closer to resolution than the day it was filed, thanks to the court of appeals ruling. See: *Blyden, v. Mancusi*, 186 F.3d 252 (2nd Cir. 1999). ■

## Illinois Jail Guards Charged With Smuggling Gun

Two former Kankakee (Illinois) County Jail guards and a civilian face multiple felony counts in connection with a dramatic December 22, 1999 jailbreak.

Newly-hired guards Melody Burdunice and Michael Cutler allegedly smuggled cellular telephone batteries to accused killer and jail detainee John "Buck Wild" Shannon. The civilian, Robert Strickland, 25, is accused of providing the handgun to Burdunice, 20, who smuggled it into the jail and delivered it to Shannon. Police sources told the *Kankakee Sunday Journal* that Burdunice and Shannon were former lovers.

Somehow the smuggled gun came into the possession of another prisoner, Terrance "T-Money" Springer, an alleged associate of Shannon, who used it to escape from the facility in the early morning hours of December 22.

Police sources say that Springer brandished the gun shortly after being escorted to the jail's property room to pick up his eyeglasses. He allegedly forced two guards to lay on the floor and had one of them make a radio call to instruct other guards to release Shannon and another prisoner, Aarano Gandy, from their cells. He apparently intended to break Shannon and Gandy out of the jail with him.

Springer then put the gun to the head of one guard and started walking towards the jail entrance, police

sources say. Two other guards ran to help. Springer shot one of the two, Michael J. Raymond, at close range in the abdomen. He then ran toward the jail's entrance and fled the facility without waiting for his partners to be released from their cells. Authorities say that Burdunice, who was working in the jail's control room, opened the final three doors that allowed Springer to escape the jail.

Police launched an intense manhunt, and Springer was captured four days later just blocks from the jail. He was charged with attempted first-degree murder, aggravated battery with a firearm, unlawful possession of contraband in a penal institution, unlawful possession of a weapon by a felon, four counts of aggravated unlawful restraint and escape.

Ernest Robertson, 21, one of the guards taken hostage by Springer, was arrested in mid February, 2000. Robertson was charged by Kankakee state attorney Michael Kick with four felony counts of custodial sexual misconduct stemming from sexual conduct with an unidentified 33 year old female jail prisoner. Robertson and the prisoner allegedly masturbated each other in areas of the jail which were not under camera surveillance. It is illegal in Illinois for guards to have sex with prisoners. Robertson has been fired by the jail. ■

Source: *Kankakee Sunday Journal*

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## Reviews

### **Women in Prison: GAO Report**

*Reviewed by Julia Lutsky*

During the calendar years 1995 to 1998, approximately 31,400 women prisoners in the three largest U.S. jurisdictions made a total of 506 allegations of staff sexual misconduct; of these only 92, or 18 percent, were sustained. "Because many female [prisoners] may be reluctant or unwilling to report staff sexual misconduct and jurisdictions lack systematic data collection and analysis of reported allegations, the overall extent of staff-on-[prisoner] sexual misconduct in female prisons is largely unknown." This, from the June 1999 Government Accounting Office (GAO) report, *Women in Prison, Sexual Misconduct by Correctional Staff*; to Eleanor Holmes Norton, who had requested the report, puts the figures quoted in good perspective: clearly they do not represent the true situation. Norton is the District of Columbia's non voting Congressional Representative.

The report is based on information gathered primarily from these three jurisdictions representing almost forty percent of the approximately 80,000 women prisoners in the United States at the end of 1998: the Bureau of Prisons (BOP; 9,200), the California Department of Corrections (CDC; 11,500) and the Texas Department of Criminal Justice (TDCJ; 10,700). Also included are the 320 prisoners in the District of Columbia Department of Corrections (DCDOC); the period covered for DCDOC was, however, 11 months shorter: December, 1995 through June, 1998. In the three largest jurisdictions the 506 sustained allegations resulted in staff resignations or disciplinary actions ranging from suspensions to criminal prosecution. Two jurisdictions did not supply information for all the types of allegations. That so few allegations were sustained was attributed to lack of evidence which, in turn, point to the reticence of women prisoners to cooperate for fear of retaliation.

The TDCJ had a majority of the sustained allegations: 48 of the 92 for the

period studied and the highest number of allegations sustained in comparison to the number made (48 of 153 or 31 percent). The CDC reported 22 sustained allegations of a total of 117. The BOP reported both the largest number of allegations and the smallest percent of allegations sustained: 236 allegations were made of which 22, or only nine percent, were sustained. Only the BOP, however, reported allegations resulting in criminal prosecutions. Fourteen allegations resulted in criminal prosecutions with convictions carrying sentences ranging from 19 years of incarceration to three months of home confinement.

The DCDOC had the highest number of allegations proportionate to the number of prisoners (34.5%) with a concomitant low number of allegations sustained (11 percent). A 1993 civil suit filed in federal court [see *PLN*, December, 1997] charging sexual misconduct by correctional staff resulted in the DCDOC's being required to develop a sexual misconduct policy. Its problems were not solved, however, since four more law suits were filed as a result of a striptease performed by women prisoners for male correctional staff in 1995. At the time of the GAO report these were the only pending civil cases reported for the District of Columbia.

During the period covered for the three largest jurisdictions, the BOP reported 14 civil lawsuits four had been closed or dismissed, one of them with a settlement of \$500,000 for three women; three had been settled and seven were still pending at the time of the report. California reported two civil suits during the period, one of which ended when the state agreed to a payment of \$73,000. The other is still pending. Texas reported four lawsuits of which three remain open. One was dismissed.

This report is available from the Government Accounting Office. The first copy is free; subsequent copies are \$2 apiece. Contact the Superintendent of Documents, U.S. Government Accounting Office, PO Box 37050, Washington, D.C. 20013 or call (202) 512-6000. You may fax a request to (202) 512-6001.

### **Marijuana Law, 2d Edition**

**By Richard Glen Boire, Ronin,  
271 pages**

*Review by Allan Parmelee*

This book is must reading for anyone interested in knowing what their rights are when dealing with police in general as well as every aspect of the law as it concerns the use, possession, growing and sale of marijuana. The book is written well and concisely and contains legal information written in plain English for the layperson, while also including case cites for those who want to use it as a research guide. This book is bad for police, devastating to prosecutors but exceptionally good for criminal defendants and rights oriented citizens. Every criminal defendant or citizen who has an encounter with police should read this book. Despite its title, it contains invaluable information for everyone, not just marijuana users.

In twelve concise chapters the author discusses everything from marijuana's legal definition to drug testing. This is not some light weight story, but an exceptionally detailed step by step analysis of marijuana, its growth, sale, use, possession and criminal penalties around the country. Of greater interest to a general audience, the book discusses in detail the constitutional law basics of searches, stops, seizures and other encounters with police. This is not just a summary but a discussion, backed by current case law, on sample hotel raids, the rights of people being searched, the rights of citizens questioned or searched by police, how police misconduct can invalidate a search and much more.

*Marijuana Law* also gives detailed information on government surveillance and spying on its citizens, including the use of informants, set ups, entrapment, mail covers, utility bills, sophisticated electronic surveillance devices and much more. Most importantly, not only does the book describe these government techniques, it also explains what to do and how to behave when encountering po-

lice. The book explains legal versus illegal searches, dog sniffs, clone pagers, phone taps, garden searches and much more. The author also includes chapters on the religious and medicinal use of marijuana and how the law recklessly infringes on its use.

The author is a criminal defense attorney. *Marijuana Law* has excellent advice for everyone on what to do if you are arrested, what not to do, how to appear in court, how to hire an attorney, court appointed counsel, how to make bail, forfeitures of property, what to do if convicted and the penalties marijuana users face if they are convicted of mari-

juana related crimes. *Marijuana Law* concludes with a chapter on drug tests, how they work, false positives and false negatives and what causes them, the law surrounding such tests and more.

This is a great book. Its only shortcoming is the title which probably misleads a lot of people into thinking its information is relevant only to people who use or are otherwise involved with marijuana, when in fact it isn't. *Marijuana Law* is available directly from Prison Legal News for \$15.99 plus \$3.20 priority mail shipping. Send orders to: PLN, 2400 N.W. 80th St. PMB 148, Seattle, WA 98117.

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## Federal Judge Hits BOP Mule With Two-by-Four

A ticked-off federal judge in Miami interrupted the fraud and money-laundering trial of jewel dealer Jack Hasson February 2, 2000, for an "extraordinary display of judicial pique and power," the *Palm Beach Post* reported.

U.S. District Court Judge James Lawrence King ordered arrest warrants for the Bureau of Prisons warden and medical director of the Federal Detention Center (FDC Miami) for failing to provide a medical test repeatedly requested for Hasson's codefendant, Clifford Sloan.

"I'm tired of this," King told the *Palm Beach Post*. "I'm tired of fooling with it. This is somewhat drastic, but I guess it's what you need to get the attention of a stubborn mule, a two-by-four."

King later rescinded the arrest orders, but hauled the warden, the doctor, and their lawyer, U.S. Attorney Tom Scott and his deputy into court for an impromptu contempt hearing that left Scott "steaming with anger and the warden bearing the marks of a tongue-lashing," *The Post* reported.

The trial, which was in its third week, was in danger of ending in a mistrial because of defendant Sloan's deteriorating medical condition. Sloan, 62, had quadruple heart bypass surgery in October 1998, six months before his arrest. He takes a blood-thinning drug to control formation of blood

clots, and is supposed to have a blood test monthly to regulate the dosage. But Sloan's lawyer, Jeffrey Voluck, told the court that his client was bleeding internally -- indicating that the dosage needed to be changed -- and had gone nearly two months without a blood test.

Judge King told U.S. Marshals to take care of the problem on several occasions. But the Marshals reported back that they were unable to get a satisfactory response from FDC Miami officials, prompting King to lose patience.

After the hastily-convened contempt hearing, U.S. Attorney Scott swept out of the courtroom and grimly summoned Warden Gregory Kapusta and others into a conference room and closed the door. Raised voices were heard in the adjoining waiting room.

Two weeks after the contempt hearing, Sloan suffered a heart attack in court and was excused from attending the remainder of the trial. Sloan was eventually acquitted of all charges against him while Fasson was convicted on six counts of money laundering and fraud.

Sloan's attorney, like other court observers, marveled at the theatrics. "Twenty-five years in practice," Voluck told *The Post*, "and I've never seen anything like it." ■

Source: *The Palm Beach Post*

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## Inmate Classified

# Republican Political Prisoners in the North of Ireland

*by David Fanning, Irish Northern Aid*

On May 22, 1998, voters in Ireland, north and south, voted overwhelmingly in favor of adopting what has become known as the Good Friday Agreement (GFA). This agreement was meant to bring to an end over thirty years of bitter conflict in the six counties of Ireland which to this day remain under English colonial occupation. Recognizing the need for an equality agenda, for a radical reform of the sectarian police force and for a devolved parliament, the agreement also called for the release by July of this year of all political prisoners affiliated with organizations observing a cease-fire. On the Republican side, this affected about three hundred prisoners who were serving long terms (very frequently life) for Irish Republican Army (IRA) activities.

The GFA was the result of ten solid years' effort to create the conditions under which the Anglo-Irish conflict could be resolved through political, rather than military, means. The part of the agreement which called for the release of POWs was the culmination of a series of prison protests which spanned the thirty years of the current conflict. To understand what is going on in the north of Ireland today, and why the English and Unionist politicians (those who want to maintain the link with England) are refusing to implement the entire agreement, it is necessary to have some understanding of Republican prison protests through that time.

On August 9, 1971, the English government instituted internment without charge or trial, a move which was allegedly meant to curb the tide of IRA resistance to English rule in Ireland. Hundreds of arrests took place that morning, with many internees being physically abused and even tortured (as has been well documented and accepted by Amnesty International and the European Community). Internment was a public relations disaster from the start. Knowing that it was coming, very few IRA activists were arrested that morning and worldwide opinion was firmly against such draconian measures.

Internment continued until December 1975. Sentenced prisoners were at

the time kept in almost identical conditions as the internees: old Nissen huts at the Long Kesh internment camp or Armagh Women's Jail. Imprisonment (whether with charge and trial or without) was protested inside and outside Long Kesh and Armagh, with the internees of Long Kesh burning the camp on October 15, 1974. Escape tunnels were so common in the ground around the makeshift prison that the English had to begin using radar photography taken from helicopters to find them. Several men escaped from the camp; others were shot to death trying.

In 1975, the English government announced that it was phasing out internment and instituting what became known as the "criminalization" policy: this policy was meant to convince the world that the Republican movement was not a liberationist struggle against oppressive tyranny but a conspiracy of gangsters. Part of this called for putting an end to so-called "special status," i.e., POW status, which the internees and sentenced prisoners had enjoyed to this point. A new prison was built on the grounds of Long Kesh: a maximum-security nightmare meant to break the prisoners and cut them off from the outside world. The first prisoner to be sentenced after the new regime was implemented, a teenager named Ciaran Nugent, refused to wear a prison uniform and was thrown into his cell naked, with only a blanket to wear: the blanket protest had begun.

The blanket protest continued until 1981 and escalated dramatically in that time. At its peak, well over a thousand Republican prisoners were on protest. Wearing only a towel, they were denied visits and parcels and educational opportunities. They refused to do prison work, but would not have been allowed to do it anyway because of their refusal to wear the uniform. They were beaten routinely and strip-searched in degrading and brutal fashion. After the beatings escalated, the men refused to leave their cells to slop out their chamber pots. This resulted in their having to smear their shit on the cell walls: the dirty protest had begun. Some men lived for three years without a bath, without a haircut or shave, naked except

for threadbare blankets and in a cell overrun with urine and maggots and with excrement smeared on the walls. They could not be broken, even by these unspeakable conditions.

The Thatcher administration, however, was determined to destroy the prisoners, knowing full well that they were the Republican movement's backbone. They refused even the smallest concessions and forced the prisoners to play their final card: hunger strike.

The story of the 1980 and 1981 hunger strikes has often been told. In all, ten men, the oldest of them 30 years old, died slow and horrible deaths to prove to the world that they were political prisoners. One of them, the poet Bobby Sands, was elected to the British Parliament while on hunger strike and another, Kieran Doherty, was elected as a Teachta Dála, a member of the Irish Parliament. The five demands for which they struck, which essentially gave them back their political status, were gained in the few years following the hunger strikes.

Today, the Republican POWs have conditions which are better than those of most prisoners throughout the world, though they gained these conditions at a terrible price and through much suffering. They are well aware that the future may return them to the dark days of the 70s and early 80s. About 160 IRA POWs have been released under the terms of the GFA. If the IRA would break its cease-fire, which it has said it has no intention of doing, the released POWs would be swept back into prison.

Just this February the Ulster Unionist Party (UUP) withdrew from the institutions set up by the GFA and England reinstituted direct rule of the six counties. This is in direct contravention of the GFA and is without any basis whatsoever except that the Unionists refuse to share power with Sinn Féin, democratically-elected members of the Republican movement. The UUP demanded that the IRA begin decommissioning (verifiably destroying their weapons or otherwise putting them beyond use) by February. This deadline was simply plucked from the air and has no basis in the GFA or in political reality. They knew it wouldn't

happen and it hasn't. The prisoners have repeatedly said that they will not be used as bargaining chips in a political game. Their future remains in doubt now.

Irish Northern Aid (or "Noraid"), has for thirty years supported the families of Irish Republican Prisoners of War through weekly support payments and funds allowing them to travel to visit their loved ones in prison. Through three decades of prison protests, the Republican POWs have never been broken, nor has their support from dedicated activists around the world. The struggle goes on and the spirit of freedom is pervasive among the prisoners. As a song from the days of the blanket protest puts it, "I'll wear no convict's uniform, nor meekly serve my time, that Britain might brand Ireland's fight eight hundred years of crime." Contact: Noraid, 363 7th Ave. #405, New York, NY 10001. ■

## Mark Cook Freed

On April 3, 2000, *PLN* contributing writer Mark Cook was released from the Monroe Correctional Complex in Washington. Mark was imprisoned for more than 24 years in Washington and federal prisons after being captured and charged in 1976 with carrying out action on behalf of the George Jackson Brigade (GJB). The GJB was a leftist urban guerrilla group in the Pacific Northwest that carried out bombings, bank robberies and other actions to overthrow the U.S. government.

Mark was convicted of participating in a GJB bank robbery and securing the release of GJB member John Sherman by shooting Sherman's police escort. A longtime prisoner rights activist and member of the Black Panther Party before his 1976 imprisonment, Mark continued his activism on behalf of prisoner and human rights throughout his captivity.

Mark will remain on Washington parole for three years. Mark was one of the longest held political prisoners in the United States. Former GJB member Ed Mead was also *PLN*'s co-founder and co-editor from 1990 through 1993.

The Washington Prison Project raised \$7,000 for Mark, which will ease his transition back into minimum security society. We wish Mark and his family the best after the last quarter century of captivity and struggle. ■

## Prison Working Conditions Protected by Eighth Amendment

A federal district court in New York held that fact issues existed as to whether a prison official was deliberately indifferent to a prisoner's health, and whether she was aware of unsafe working conditions. Since both situations fall within the purview of the Eighth Amendment, a trial was necessary to resolve the factual disputes.

In 1995, John Bauman was a New York state prisoner confined to Ulster Correctional Facility (UCF). Initially, he injured his elbow falling out of an upper bunk. He subsequently reinjured the elbow on two separate occasions, while working in the UCF State Shop.

Later that year, Bauman sued five prison officials, under 42 U.S.C. § 1983, for allegedly violating his Eighth and Fourteenth Amendment rights. He also asserted three state law claims.

After both parties moved for summary judgment, a magistrate judge recommended denying Bauman's motion, while granting the defendants' in part.

The only claims to survive the magistrate's determination were Bauman's Eighth Amendment claims against UCF State Shop supervisor Ms. McCollum, who was Bauman's boss.

Since only the defendants objected to the magistrate's report and recommendation, the district court's review was limited to Bauman's surviving claims.

These Eighth Amendment claims fit into two categories: (1) McCollum's prevention of Bauman from receiving adequate medical care, and (2) her forcing him to work in a hazardous or unsafe environment. The district judge analyzed each claim under separate and distinct tests.

The test for improper or inadequate medical treatment consists of two elements: (1) deliberate indifference to (2) a serious medical need. The threshold element being the latter, turns on the "seriousness" of the condition.

In deciding the issue, the court noted that *Chance v. Armstrong*, 143 F.3d 702 (2nd Cir. 1998), identified three

"highly relevant" factors for considering whether a medical condition is "serious." In this regard, the court found that Bauman was seen by medical personnel for pain or injury to his elbow no less than 27 times. Based upon these allegations, the court concluded that Bauman had met each of these *Chance* factors.

With respect to the deliberate indifference element, Bauman claimed that McCollum ignored his repeated requests for medical leave and job reassignment.

In addition, she allegedly denied him "prompt emergency treatment" or "access to treatment" when he reinjured his elbow at work, even though he "was in severe pain." As a result, Bauman stated a prima facie constitutional medical claim.

The test for unsafe working condition claims is: (1) incarceration under conditions which pose a substantial risk of harm, and (2) deliberate indifference to a prisoner's health or safety. As with the medical care claim, the objective component takes precedence.

By affidavit, Bauman alleged that he was forced to climb along shelves and stand on boxes to retrieve materials from top shelves. The court found these conditions to be "inherently unsafe and dangerous."

Even though Bauman sustained no injury from these conditions, the issue turned on the "risk" of serious harm, "not whether serious harm actually occurred."

Although McCollum denied compelling Bauman to work in such unsafe conditions, the court noted it was prohibited from weighing evidence, assessing credibility, or resolving issues of fact at the summary judgment stage.

Consequently, Bauman's Eighth Amendment claims appear destined for trial. See: *Bauman v. Walsh*, 36 F.Supp.2d 508 (ND NY 1999). ■

# U.S. Supreme Court to Revisit Civil Commitment

On March 20, 2000, the U.S. Supreme Court granted Certiorari to the State of Washington appealing a ninth. Circuit order for the district court to hold an evidentiary hearing to determine if the state's civil commitment statute "as applied" to petitioner renders the statute "punitive" in nature and thus violates ex post facto and double jeopardy.

The question to be decided by the Supreme Court is: "Can otherwise valid civil statute be divested of its civil nature and held to violate Double Jeopardy and Ex Post Facto Clauses because administrative agency operating commitment facility fails to provide for treatment and other conditions of confinement mandated by statute at some time during individual's commitment?" See: *Seling v. Young*, No. 99-1185. The underlying ruling is *Young v. Weston*, 192 F.3d 870 (9th Cir. 1999) [not previously reported by PLN].

Andre Young filed a petition for writ of habeas corpus, which was granted by the federal district court for the Western District of Washington on August 25, 1995. The district court, ruling on cross motions for summary judgement and without holding an evidentiary hearing, held Washington's civil commitment statute unconstitutional on ex post facto, double jeopardy, and substantive due process grounds, but stayed Young's release. The state appealed to the Ninth Circuit. After issuance of *Kansas v. Hendricks*, 117 S.Ct. 2072 (1997) [PLN, Aug. 1997], the Ninth Circuit entered an order remanding the case back to the district court for reconsideration in light of *Hendricks* (122 F.3d 38 9th Cir. (1997) [PLN, Dec. '97]). On February 10, 1998, the district court dismissed Young's petition, upholding the state's civil commitment statute under *Hendricks*.

Young appealed to the Ninth Circuit, which remanded the case back to the district court for an evidentiary hearing on Young's ex post facto and double jeopardy claims. See: *Young v. Weston*, 192 F.3d 870 (1999).

The Ninth Circuit noted: "In *Hendricks*, the Supreme Court held that, because involuntary confinement pursuant to Kansas's civil commitment statute is not punitive, that statute's operation does not raise ex post facto or double

jeopardy concerns. Because the Kansas statute was modeled on and is substantially similar to the Washington statute, *Hendricks* forecloses the claim that the Washington statute, on its face, violates the ex post facto and double jeopardy clauses.

"But *Hendricks* does not preclude the possibility that the Washington statute, as applied, is punitive."

The Ninth Circuit further noted: "The linchpin of this case is whether the Washington statute, as applied to Young, is punitive and thereby subject to the ex post facto and double jeopardy clauses of the United States Constitution .... Actual conditions of confinement may divest a facially valid statute of its 'civil' label only upon a showing by the 'clearest proof' that the statutory scheme is punitive in its 'effect.' [cite omitted]... we conclude that Young has alleged sufficient facts that, if proved, would constitute 'clear proof.'"

The State of Washington, in its Petition for Writ of Certiorari to the U.S. Supreme Court, challenges the ninth circuit's "as applied" analysis and argues that "a court must analyze a statute on its face in determining whether it is civil or criminal."

The state further argued: "First, the Ninth Circuit's notion that administrative action [i.e. how the state's civil commitment center is operated] can 'divest' a statute of its civil nature is particularly troubling. The Washington Statute requires constitutionally adequate treatment for sexual predators. [cite omitted] Now, many years after the passage of the Statute, the Ninth Circuit's 'as applied' double jeopardy and ex post facto doctrine may operate to 'divest' the Statute of its civil intent and purpose... No other constitutional doctrine operates in this manner -- granting an executive branch agency the power to effectively invalidate a statute through improper administration, which is in violation of the statute's express mandate. The Court should closely question the wisdom of this expansion of executive branch power under the guise of the double jeopardy and ex post facto clauses."

The state Attorney General's argument is particularly ironic in light of the fact that for years the state has stead-

fastly argued that its civil commitment center is properly administered and in compliance with constitutionally mandated minimum standards for the provision of treatment and conditions of confinement (even though the facility has operated under a federal court injunction for five years because the federal district court has consistently held that both the "treatment" and conditions of confinement fail to meet such standards).

PLN will report the outcome of the U.S. Supreme Court ruling as soon as possible after its issue. [Note: excerpts from the state's petition for writ of certiorari are quoted from the Whitestone Foundation Newsletter, March 2000. There is no more complete source of information and legal news pertaining to civil commitment than the Whitestone Newsletter. You can subscribe by sending a donation of \$10 (or more, if you can afford it) to: Whitestone Foundation, PO Box 1138, Bothell, WA 98041-1138. Whitestone is a non-profit entity.]

See: *Seling v. Young*, No. 99-1185, and *Young v. Weston*, 192 F.3d 870 (9th Cir. 1999). ■

## Fire Mountain Gems

## West Virginia Prisoners Protest Visit/Phone Restrictions

Prisoners at the Mount Olive Correctional Center in West Virginia staged a walkout on Monday morning August 30, 1999 to protest a new visitation policy and problems with the phone system.

More than 200 prisoners gathered in the prison's recreation yard and sat down. Most of them had walked away from industry jobs. After 90 minutes Warden Howard Painter promised to meet with four prisoner leaders and said he will begin a weekly closed-circuit television address to keep the prison population informed about what the administration is doing.

The protesters complained about restrictive visitation policies enacted after a female visitor smuggled a gun inside the maximum-security prison August 8. They also cited interruptions in telephone service, and demanded that prisoners locked-down in the Quilliams II unit (a "supermax" segregation unit) be given back lost privileges.

Warden Painter agreed to restore privileges to the Quilliams II prisoners, who had been without showers, hot meals, or television since the August 8th gun-smuggling incident.

"I do know that [Painter] made cigarettes and coffee available to [the Quilliams II prisoners]," Corrections Commissioner Paul Kirby told the *Charleston Gazette*. "We're going to see if we're looking at a communication problem," he added.

"My experience has always been that whenever you have a sit-down like this, my staff and I would be talking to every inmate and staff member in that institution," said Donald Bordenkircher, a criminal justice professor at a college near the prison. "Take a look at whatever people are upset about, and correct what you can... and if you fail to do that, my experience is that you better duck."

Prisoners and family members complained bitterly about the restrictive visiting policies, contending that they were being punished for mistakes made by guards who allowed a woman to smuggle in a gun without searching her properly.

The telephone complaints centered around the contract between the prison system and its "inmate telephone sys-

tem" provider, Computer Integrated Communications, Inc. Prison officials admit that CIC has cut off phone service to some areas of the state. The company was involved in bankruptcy proceedings, and federal courts refused to allow the state to dissolve contracts with the firm.

"I think they have some legitimate complaints," said Kirby. Telephone contact with the outside world is "a very substantial" benefit for prisoners, he said. He also promised that the visitation policies would be revisited. "I certainly think from what [prisoners] said that some of this can be worked out."

Kirby expressed concern about what he sees as "possible [outside] help in planning" the protest. He wants to find out if a candlelight vigil held by Citizens United for Rehabilitation of Errants at the state capitol to protest visitation policies is related to the prison protest that occurred two days later.

If the prison protest and CURE vigil are "sort of tied together... that's not good," Kirby said, refusing to elaborate. ■

Source: *The Charleston Gazette*

## Illinois Phone Suit Dismissed

In the August, 1999, issue of *PLN* we reported that a class action suit had been filed in federal court in Illinois challenging the extortionate phone rates charged to those who accept collect calls from prisoners.

On March 23, 2000, federal district court judge William Hibbler ordered the suit dismissed on the defendants' motion to dismiss. The plaintiffs in the suit consisted of prisoners phoning people outside prison and free citizens desiring phone contact with prisoners. The defendants are the Illinois Department of Corrections and various Illinois county jails that have entered into exclusive phone service contracts with phone companies. Also being sued are the phone companies that provide phone services to Illinois prisons and jails and charge rates significantly higher than those charged for collect calls by non prisoners. The plaintiffs claimed that the high rates violated numerous provisions of the U.S. and Illinois constitutions, the Sherman Anti-Trust Act, the federal 1996 federal telecommunications act and various state laws. (See the August, 1999, *PLN* for the full details on the suit.)

The court held the issues were non justiciable under the "filed rate" and "primary jurisdiction" doctrines. Under 47 U.S.C. § 203(a) phone companies file tariffs with the state and federal government on the rates, terms and conditions of the telecommunications

services they provide. This is supposed to allow regulation by the Federal Communications Commission (FCC) and Illinois Communications Commission (ICC).

The court held that as a matter of statutory law, the FCC and ICC have the authority to determine the fairness of all phone rates. "In that determination, this court has no role whatsoever." The court stated it would defer to the FCC and ICC because it lacked experience in determining the fairness of the phone rates; congress had set no guidelines for judicial determination of these matters and it would encroach on the sovereignty of the Illinois government.

The court observed that any relief it might order would pose problems of its own. The court held "Although there are some significant public policy issues which may dictate a need for review of these rates, it is not the role or function of this court to effectuate public policy."

The court's dismissal of all claims stated it was appropriate for the matter to be referred to the FCC and ICC for review. The plaintiffs are appealing the dismissal. This is the first ruling to be issued in the various lawsuits challenging prison and jail phone rates. Anyone desiring a copy of this unpublished ruling, send \$5 to *PLN* and state what it is for. See: *Arsberry v. State of Illinois*, USDC ND IL, Case No. 99C-2457. ■

## Former BOP Director Fingering in Sex Scandal

In 1992 Bureau of Prisons (BOP) employee Steven McPeck quietly settled a sexual harassment complaint he leveled against then-BOP director J. Michael Quinlan, according to recently filed court papers. McPeck alleged in his 1992 complaint that Quinlan made sexual advances beginning in August 1990 while they traveled together on government business.

Quinlan resigned as director of the prisons bureau two months after McPeck's sexual harassment claim was settled, a move BOP officials attributed to "health problems." At the time, Quinlan was also being investigated on suspicion of trying to silence a federal prisoner who was about to go public with claims that the prisoner sold marijuana to then-vice presidential candidate Dan Quayle in the 1970's.

After retiring from the BOP, Quinlan joined the management team of Corrections Corporation of America (CCA). McPeck was re-assigned to another job within the Department of Justice (DOJ).

But McPeck now alleges that the terms of the 1992 settlement, which required that the complaint remain confidential and that there would be no retaliation against him, were breached by DOJ officials who used the information in a subsequent "campaign of retaliation" against him. He now seeks \$800,000 in damages, alleging that his DOJ supervisors and colleagues made it clear they were aware of his 1992 sexual harassment complaint, and that caused him to be excluded from important meetings, presentations and decisions, denying him the opportunity to advance his career.

All of those actions, McPeck's lawyers allege, arise from the 1992 harassment claim that accused Quinlan of attempting to fondle, grab and engage McPeck in sexual banter.

On two consecutive evenings in 1991, Quinlan allegedly invited McPeck, then Quinlan's 29-year-old assistant at the Bureau, to his hotel room in Texas. The first night, McPeck said he rebuffed Quinlan's advances after the director "embraced" him.

The second night, McPeck said Quinlan directed him to take off his shoes "and place his legs on the bed where Mr. Quinlan was lying. When Mr. McPeck attempted to leave the hotel room, Mr. Quinlan embraced him and pressed his erect penis against Mr. McPeck's body."

The following morning, Quinlan allegedly apologized to McPeck for his behavior and assured him "it would never happen again." McPeck said the harassment continued nonetheless.

Quinlan, speaking through CCA spokeswoman Susan Hart, categorically denied the allegations. He was recently named interim president of Prison Realty, in addition to being president and chief operating officer of CCA. His earlier roles with the Nashville-based private prison corporation included serving as CCA's director of strategic planning, and as CEO of CCA Prison Realty Trust after the real estate investment trust was formed by CCA in 1997 to own its own prisons. ■

Sources: *USA Today*, *Wall Street Journal*

FDC

# Colorado Prison Population Exploding

by Bob Williams

Last summer the Executive Director of the Colorado Department of Corrections, John Suthers, announced to the Colorado Legislature that Colorado's male prison population is growing at its fastest rate ever. In fact, at an average of 1.3% per month in the second quarter of 1999, the prison population grew at twice the rate it did during the same period in 1998. This sudden expansion is the result of conservative appointments to Colorado's parole board by newly elected Republican Governor Bill Owens. The board's chairman, Larry Schwarz, admits their parole denials directly reflect the governor's intentions.

As a result of the parole board's actions, Colorado will now need a 2,500 bed megaprison every two years. That amounts to daily prison construction in perpetuity. It also means less and less of the state's \$10 billion annual budget will go to education, health care, road construction and other infrastructure improvements.

Colorado already spent \$645 million for new prisons in the 1990's and now needs \$85 million per year (or \$21.50 from every man, woman and child) just in new construction funds, plus another half-billion annually in operating costs. Since an amendment to the State Constitution limits spending increases to 6% annually, everybody else must lose--especially when corrections is the fifth largest consumer of state revenue and growing at an annual rate of 9%.

By comparison, twenty years ago the CDOC's annual budget was less than \$20 million and the prison population was less than 2,000.

Unfortunately, only a few lawmakers are starting to see the light. One that has, state Sen. Bill Thiebaut, says that "we're suffocating the whole system, and the citizens are bearing the burden." He finds funneling money from children's education into prisons a travesty, and calls for a re-evaluation of criminal penalties.

In addition to a more conservative parole board, other factors are cited as contributing to the increase in prison population including: longer prison sentences (e.g., a life sentence was once a

minimum ten years to parole eligibility; today it's life without parole), an increase in parole revocations, and an increase in overall state population bringing an increase in crime. On this last point, however, the actual crime rate is admittedly down, according to the same published reports.

It is unlikely Colorado can build its way out of its prison population explosion. That lesson should have been learned by the debacle Colorado went through when it sent prisoners to state facilities in Missouri and Washington in the late 1980's and private facilities in Texas (1994-1997) and Minnesota (1994-1998). There are currently four in-state private prisons housing 2,500 prisoners, or approximately 17% of the total prison population. State Rep. Joyce Lawrence, Chairwoman of the Capital

Development Committee, contends that new prisons are being built to take prisoners out of private prisons "then the parole rate goes down and we need private prisons again, but now we don't know if they'll be there." Some of these facilities are now under investigation, including to find out why some female guards are pregnant with prisoners' children. [PLN, Mar. 2000]

One solution is to grant parole to all eligible prisoners and those long past their eligibility dates. The Governor has a different solution. "Governor Owens has never hesitated to say that if we need to build more prisons to hold criminals then that's what we'll do" says Owens' press secretary, Dick Wadhams. ■

Sources: *Rocky Mountain News*, *Denver Post*

## Four Texas Guards Nabbed in Bribery Sting

Four Texas state prison guards face felony bribery charges after agreeing to launder supposed drug money for prisoners, authorities told *The Associated Press*.

The four were arrested January 24, 2000 after walking into an undercover sting orchestrated by the Texas Department of Criminal Justice (TDCJ) Internal Affairs office and the Goliad County Sheriff's Office. Three of the suspects, Eliseo Martinez, 29, his wife Kimberly Martinez, 23, and brother-in-law Ronald Belcher, 24, were guards at the McConnell Unit in Beeville, about 40 miles northwest of Corpus Christi. The fourth was Mark Valdez, 31, a guard at the nearby Garza West Unit.

Investigators developed the case after receiving an informant tip that "free world individuals along with people at the prison" were involved in a drug money laundering operation, TDCJ spokesman Larry Todd said. He refused to elaborate on the alleged conspiracy and said investigators do not know whether the guards had succeeded in laundering any money.

The Martinezes and Belcher were arrested in an "undisclosed location" [probably a parking lot] after Eliseo Martinez accepted a package from an un-

dercover officer. Martinez believed the package contained \$60,000, Todd said, and agreed to launder \$50,000 for an unnamed prisoner and keep \$10,000 for himself. Martinez's wife and brother-in-law were nearby acting as look-outs. All three were quickly arrested as soon as Martinez took the package.

Valdez was arrested at his Beeville home a few hours later after agreeing to a similar money laundering arrangement, Todd said. Valdez was supposed to have met with an undercover cop to pick up the cash, but sent his 16-year-old half brother instead. The brother was questioned and released.

All four guards were charged with bribery, a second-degree felony punishable by up to 20 years in prison and a \$10,000 fine. Mrs. Martinez was also charged with aggravated assault on a police officer because she drove her Ford Explorer into an Internal Affairs officer's car while attempting to flee, authorities said.

Todd said that both Martinezes resigned from their jobs and that "appropriate action" would be taken against the other two. ■

Source: *The Associated Press*

## New York Jail Guards Charged With Raping Prisoners

On January 26, 2000, Westchester county, New York, jail guards Carlos Aldarondo, 33, Javier Corona, 31, Michael Downey, 39 and Robert Escalera, 39, were charged in Westchester county court with assorted felony charges stemming from their rape and sexual abuse of women prisoners in the jail.

County executive Andrew Spano said "These are not isolated incidents. This is an abuse of power by the officers involved. We think that a change of procedures is warranted. We don't want men any longer to have access to the living quarters of female prisoners." Spano announced that henceforth only women guards would be assigned to work in the women's living quarters section of the jail.

The guards' arrest was the result of a six month investigation that began after a victim's friend complained of the sexual abuse to county jail officials and Westchester district attorney Jeanine Pirro.

Aldarondo is charged with raping and orally sodomizing a woman prisoner in her cell. Corona is charged with raping a woman in a jail supply closet. Downey is charged with sexual abuse and official misconduct for forcing three women prisoners to strip and expose their genitals to him. Escalera is charged with official misconduct for demanding that a woman with a toothache expose her breasts to him in exchange for Tylenol. To get more Tylenol to lessen her pain (the tooth was extracted a few days later), she was forced to show Escalera her genitals.

What makes this story unusual is that Westchester county officials are willing to admit that the sexual abuse of prisoners is a widespread problem and, more importantly, that they took immediate steps to correct the problem. As *PLN* regularly reports, most jurisdictions continue referring to ongoing episodes of sexual abuse of prisoners as "isolated incidents" which begs the point of when do these things stop being "isolated incidents"? The guards union has since filed suit to prevent the staffing change at the jail. ■

Sources: *New York Times*, *Newsday*

## \$200,000 Awarded in Michigan Jail Wrongful Medication Suit

On June 22, 1999, a Macomb county jury in Michigan awarded \$200,000 in damages to David Dempsey after he was wrongly medicated in the Macomb county jail. Dempsey suffers from bipolar disorder. While imprisoned on the psychiatric floor of the Macomb county jail, Suzanne Pease, a nurse with St. Joseph Mercy Hospital, who contracted to provide the jail's medical care, wrongly administered Prolixin Deconoate instead of Haldol Decanoate

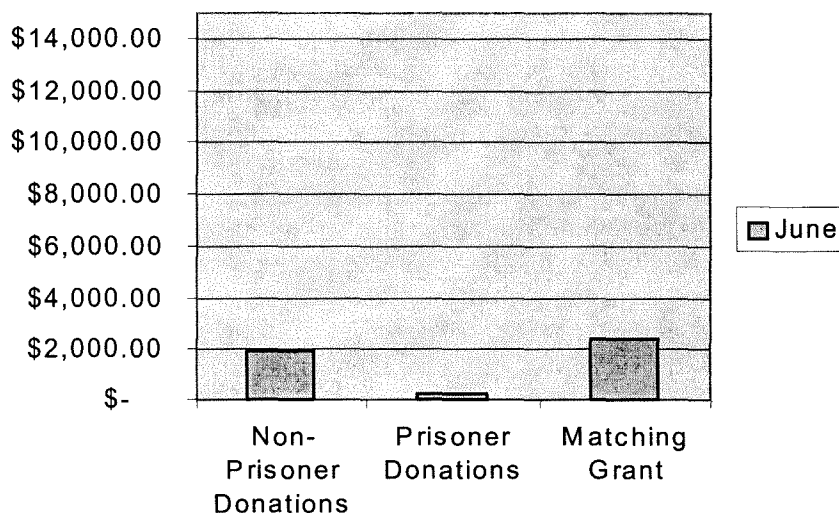
to Dempsey. As a result, Dempsey was left impotent for life. Dempsey is a single male in his twenties. After deliberating for six hours the jury awarded Dempsey \$200,000 in joint and several damages against Pease, St. Joseph Mercy Hospital and Macomb county. See: *Dempsey v. Pease*, Macomb County Circuit Court, Case No. 96-5850-NH. ■

Source: *Michigan Trial Reporter*

### Contribute to PLN's Matching Grant Campaign

A PLN supporter will provide a matching grant for all individual donations made to PLN between March 1, 2000 and January 15, 2001, up to and including \$15,000. The matching grant does not apply to money sent to PLN to pay for subscriptions, buy books or to grants from foundations. It applies only to individual donations. Donations by non prisoners will be matched dollar for dollar up to \$500. Donations by prisoners will be matched at the rate of two dollars for every dollar given. All donations are tax deductible. New, unused stamps and embossed envelopes are fine. If you haven't donated to PLN's Matching Grant Campaign yet, please do so now. No amount is too small and every little bit helps. We will announce the amount raised in our February, 2001 issue unless we meet the \$15,000 goal before then.

### Matching Grant--June, 2000



## Washington Restitution Orders Are Invalid After 10 Years

The Washington state Supreme Court, sitting En Banc, held that the 10 year life of restitution orders begins to run upon release from confinement and is not tolled by any subsequent imprisonment on unrelated charges.

In 1986, Brandt Sappenfield was convicted of crimes in Benton and King counties. He was sentenced to prison and ordered to pay restitution in both counties.

Sappenfield was released from prison on August 16, 1987. But he was returned to prison on a murder conviction in 1989.

In 1997, Sappenfield filed two Personal Restraint Petitions (PRPs) in the Court of Appeals, challenging the Department of Corrections' (DOC) ongoing attempt to collect restitution on the 1986 orders.

The PRP regarding the Benton County restitution order was filed in Division Three and the PRP regarding the King County orders was filed in Division One.

In both PRPs Sappenfield claimed that the restitution orders expired in 1996 under RCW 9.94A.142(1986). The State argued that Sappenfield's 1989 reincarceration tolled the court's jurisdiction under RCW 9.94A.142(1994).

Division Three issued an unpublished order dismissing the PRP and allowing the DOC to continue collecting on the Benton county restitution order. But Division One issued a published decision, finding for Sappenfield and ordering the DOC to stop collecting restitution on the King County orders. See: *In re Personal Restraint of Sappenfield*, 964 P.2d 1204 (1998)[PLN July 1999].

Sappenfield appealed the Division Three decision and the State appealed the Division One decision and the cases were consolidated for review.

The Court observed that under RCW 9.94A.142(1986) Sappenfield's restitution orders expired in 1996 - 10 years after the sentences were imposed - and under RCW 9.94A.142(1994), the life of the restitution orders extended

to August 16, 1997 - 10 years after Sappenfield's release on the 1986 convictions.

The Court rejected the State's tolling argument, holding that the restitution orders expired in 1997. The Court concluded that because RCW 9.94A.142(1994) contains no tolling provision and one cannot be read into it, Sappenfield's subsequent incarceration had no impact on the life of the orders.

Although not at issue in the case, the Court, citing *State v. Shultz*, 980 P.2d 1265 (1999)(En Banc), observed that under RCW 9.94A.142(1997), the State can request that a court extend its jurisdiction an additional 10 years over an unexpired restitution order.

Finding that under either the 1986 or 1994 version of RCW 9.94A.142, the DOC no longer had authority to collect on the 1986 restitution orders, the Court declined to address Sappenfield's constitutional challenges. But the Court held in *Shultz* that the application of the 1994 and 1997 amendments was not unconstitutional.

The Court reversed the Division Three order and affirmed the Division one decision but rejected Sappenfield's request for remand to determine how much money the DOC had improperly collected.

The Court found that such a remedy is beyond the scope of relief of a PRP and that Sappenfield would have to file a civil action to recover any wrongfully collected funds. See: *In re Sappenfield*, 980 P.2d 1274 (Wash. 1999).

In a related case, the Court of Appeals held that a court does not have authority to enter an order setting a restitution hearing under RCW 9.94A.142(1) more than 180 days after sentencing.

The court also held that inadvertence or attorney oversight was not "good cause," justifying a continuance of the restitution hearing. See: *State v. Johnson*, 981 P.2d 25 (Wash.App.Div.3 1999). ■

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## Exhaustion Not Required for Claims of Assault

A federal district court held that the Prison Litigation Reform Act's (PLRA) exhaustion requirement does not apply to assault claims. It also held that a cause of action under the Violence Against Women Act, (VAWA), is analogous to a cause of action under Section 1983, and that supervisors are liable under the VAWA for the actions of their subordinates.

Since 1994, numerous instances of sexual abuse of prisoners by guards at the Federal Correctional Institution, (FCI), in Danbury, Connecticut, have been investigated. FCI guard Opher Cephas was the subject of those investigations. Yet, throughout 1995 and 1996 Cephas was placed in positions which allowed him to regularly grope the breasts and groin area of FCI prison Sharon Peddle and to compel her to engage in oral and vaginal sex.

On May 25, 1996, after forcing Peddle to perform oral sex, Cephas was arrested by FBI agents. He later pled guilty to six counts of sexually abusing a prisoner. Peddle then sued present and former prison officials, alleging that her rights under the Fourth, Fifth and Eighth Amendments and the VAWA were violated by Cephas' repeated sexual assaults. Defendants filed a motion to dismiss.

The court noted that under the PLRA exhaustion is a mandatory requirement to filing a conditions of confinement claim, but held that allegations of sexual abuse are not claims concerning prison conditions. Because all of Peddle's claims related to her intentional assault rather than to her conditions of confinement, the court held that her suit was not subject to the PLRA's exhaustion requirements.

Peddle's claim under the VAWA, which provides a right to be free from crimes motivated by gender, 42 U.S.C. § 13981(b), was based upon several different theories of supervisory liability.

Noting that the VAWA is a relatively new statute and the applicability of supervisory liability appears to be an issue of first impression, the court held that a cause of action pursuant to the VAWA is analogous to a cause of action under § 1983. Accordingly, the court held that application of supervisory liability is ap-

propriate and Peddle stated a cognizable claim for relief. *Peddle v. Sawyer*, 64 F.Supp.2d 12 (D.Conn. 1999). It should be noted, however, that the Supreme

Court recently struck down the VAWA as unconstitutional in *Brzonkala v. Virginia Polytechnic Institute and State University*, 120 S.Ct. \_\_\_\_ (2000). ■

## Oregon Execution Viewing Rules Invalidated

The Oregon Supreme Court invalidated several administrative rules of the Oregon Department of Corrections, (ODOC), regarding the witnessing of executions. The Court held that the challenged rules exceeded the ODOC's rulemaking authority.

The Oregon Newspaper Publishers Association and several other members of the media challenged a series of rules promulgated by the ODOC which imposed various conditions and restrictions on persons who witness executions of death sentences which are carried out by the ODOC. The Court described those rules as nondisclosure and limited access rules.

The nondisclosure rules required all witnesses to agree, as a condition of attending the execution, that they would waive their rights to free expression with respect to certain things they might see. The limited access rules restricted what the witnesses see when the lethal injection is actually administered and causes death.

The Court of Appeals upheld the challenged rules, holding that they did not violate the First Amendment, or Oregon's free expression clause, in any of the ways that petitioners asserted. *Oregon Newspaper Publishers v. Dept. of Corrections*, 966 P.2d 819 (Or.App. 1998). The Supreme Court reversed the Court of Appeals decision, however, resolving the case on statutory rather than constitutional grounds.

With respect to the nondisclosure rules, the Court found that none of the statutes from which the ODOC's authority arises permit the ODOC to condition a right to be present on a witness' willingness to waive his or her free expression rights - not only while still inside the institution, but afterwards. Accordingly, the Court concluded that the nondisclosure rules exceeded the ODOC's rule making authority and, therefore, are invalid.

With respect to the limited access rules, the Court found that remote activi-

ties that precede an execution, such as holding the prisoner in a special cell or the serving of a special last meal, are not a part of the execution. But the Court found that those actions that are linked inextricably with the administration of the fatal drugs, such as connecting special monitoring equipment to the prisoner, placing the prisoner in restraints, and inserting a catheter that later will be used to administer the fatal drugs, are part of the execution.

The Court held that the limited access rules which prevented witnesses from seeing those activities that are linked inextricably with the administration of the fatal drugs, exceeded the ODOC's statutory authority and, therefore, were invalid, because they impaired the right granted to the witnesses under ORS 137.473, to view the execution. *Oregon Newspaper Publishers v. Dept. of Corrections*, 988 P.2d 339 (Or. 1999). ■

### Torture Information Wanted

The American Friends Service Committee is seeking personal testimonies of people in isolation units or facilities who have endured use of electronic, chemical, or physical devices of restraint. We understand that we are, once again, asking prisoners for something while we offer nothing in exchange besides our thanks. Some testimonies will be used in a pamphlet we are readying called "Testimonies of Torture in US Prisons". We will also use the testimony in speeches, articles, etc. We humbly thank those of you who are able to help. Please send statements to: Bonnie Kerness, AFSC, 972 Broad Street, Newark, NJ 07102.

## Prison Psychologist Pleads Guilty to Aiding Escape

Elizabeth Feil, 43, a former psychologist at the Patuxent Institution in Baltimore, MD has pled guilty to accessory to escape for her role in helping her lover, Byron Smoot, 29, escape from a medium security prison in Jessup, Maryland.

Smoot had been under the care of Feil when he was at Patuxent. For over a year the couple enjoyed a deep love affair through both physical contact and extensive letters. The affair continued even after she was fired.

On May 18, 1999, eleven months after Feil was fired, Smoot and Gregory Lawrence, 39, escaped by sneaking out a front door past a guard tower to an awaiting Feil who whisked them away. They were apprehended two days later in a motel in Baltimore.

During the subsequent investigation it was revealed that over 100 love letters were found in a shoe box in Feil's home. Even detailed escape plans were found there. Meanwhile, Smoot had a photo of a scantily clad Feil taken while she was on vacation with her husband, Glenn Bosshard. When deputies asked Bosshard to identify his wife in the photo a shocked husband said, "I thought we were deeply in love. You have no idea how devastated I am by this."

Feil visited Smoot 60 times in a nine month period. Between visits, Smoot used five prison fax lines to call Feil, ringing up a \$595 phone bill. The visits and phone calls escaped notice from prison administrators until Smoot was gone.

Feil was sentenced to six years in jail and three years probation. ■

Sources: *Keeper's Voice*, *Seattle Times*

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### Attention Prisoners!

Due to increasing postage and printing costs PLN must increase its prisoner subscription rate to \$18 per year. We delayed increasing our prisoner subscription rates for over two years. The new subscription rate goes into effect on August 1, 2000. Prisoners can subscribe, renew lapsed subscriptions or extend current subscriptions for as many years as they want at the \$15 rate until then.

• • • • •

Cox

Kent Russell

Paper Wings

Inmate Aids

## News in Brief

**Brazil:** On March 11, 2000, 17 prisoners armed with knives overpowered four guards at the Mata Grande Penitentiary in Rondonopolis and forced them to open the cellblock of a rival gang. The armed prisoners then proceeded to kill 13 and wound 3 of their rivals. Three hours later police stormed the prison and regained control. This was the fourth uprising since the prison opened in November, 1999. The dispute was allegedly over control of the drug trade in prison.

**Canada:** On March 6, 2000, 90 prisoners at the Regina Correctional Institution in Saskatchewan lit fires, broke windows and refused to return to their cells to protest a ban on tobacco smoking in the jail.

**Colombia:** On April 1, 2000, an unknown number of Marxist guerrillas of the National Liberation Army (ELN) stormed the jail in Cucuta, a town near the Venezuelan border, with small arms fire. Prisoners inside the jail took part in the fighting and after an hour of intense combat 74 prisoners escaped, taking a guard with them as a hostage. Two guards were wounded and four prisoners killed in the firefight. A car bomb was used to blast a hole in the prison wall. Most of the escapees were captured guerrillas belonging to the FARC and the ELN.

**Colombia:** On March 8, 2000, 200 guerrillas of the Marxist Revolutionary Armed Forces of Colombia (FARC) stormed a prison in El Bordo using homemade missiles and machineguns. After overpowering prison guards the guerrillas freed 92 prisoners and then fled. Prison officials did not state how many of the escaped convicts were FARC members. The FARC has repeatedly demanded the release of some 400 of its members being held in government prisons in exchange for the 350 police and soldiers it holds captive. To date the Colombian government has refused any exchange of prisoners.

**Colombia:** On February 20, 2000, Hernando Prada, a prisoner convicted of murder, pulled a knife and hijacked the plane that was transporting him to a different prison. Prada was being escorted by two armed prison guards.

Prada forced the plane to land at a small airstrip in the town of El Tornillo and fled with one of the guards as hostage.

**Dominican Republic:** On March 18, 2000, a propane stove in La Victoria prison in Santo Domingo started a fire that killed 11 prisoners and injured 28 more. A prisoner's propane stove ignited a bed sheet in a former dining hall now used to house 370 prisoners. The prison was built to hold 800 prisoners in 1952 but now houses more than 3,000.

**FL:** On December 21, 1999, Josie Clark, 51, and Wendy Calderone, 32, hijacked a helicopter at gunpoint that they had chartered at the Keystone Heights airport. The women were apparently attempting to free Clark's husband, Ronald Clark, 31, a prisoner on death row at Union Correctional Institution in Raiford. Within three miles of the prison the women had second thoughts and ordered the pilot to return to the airport. The women were arrested later that evening and charged with armed kidnapping in state court and air piracy in federal court.

**GA:** On January 13, 2000, former Cherokee county jail guard Donald Ware was sentenced to one year probation and a \$1,000 fine after pleading guilty to a federal civil rights misdemeanor. Ware stood on the back of Christopher Stone, a pretrial detainee, and sprayed him with pepper spray while Stone was handcuffed to a chair.

**GA:** On March 7, 2000, Fulton county (Atlanta) jail guard Patrick Brown, a 9 year employee, was arrested in a police sting operation where he took \$3,000 to help a prisoner escape from the jail. Brown was turned in by the girlfriend of an unidentified prisoner. Brown was also charged with helping another prisoner successfully escape from the jail and bribery. Jail captain Zandra Williams was suspended as part of the investigation. Brown would allegedly alter prisoners' release dates in the jail computer to ensure their early release.

**IL:** State prison guards at 10 Illinois prisons tested positive for illegal drug use more often than prisoners at the same prisons. 2.5% of the 3,506

state prison guards randomly tested for illegal drug use had positive test results. At Danville, 5.5% of the tested guards had used illegal drugs, compared to 4.4% of the tested prisoners in Danville. State representative Cal Skinner called for more drug testing of prison staff, which is bitterly opposed by the guards' union. Roberta Lynch, the guard union's deputy director, said that testing more than the 20% of Illinois DOC employees now allowed under the current labor agreement would divert resources from prison understaffing and purported prisoner violence against guards. "For a state representative to be focused on the tiny minority of employees who use drugs rather than focusing on the overwhelming majority of employees... who confront these problems everyday... I just think it's a disgrace," Lynch said. Of course, the same logic applies to the resources prison officials direct at the tiny minority of prisoners who use illegal drugs.

**NE:** On February 24, 2000, Aaron Finney pleaded guilty to being a habitual criminal. He then disappeared from the courtroom.

**NJ:** On February 28, 2000, South Woods State Prison prisoner Sebastian Tortorici was charged with recruiting Zoltan Czikora, a guard at the prison, to hire a hit man to kill the ex girlfriend. Tortorici was convicted and imprisoned for attempting to kill in 1998. An informant told the FBI about the plot, who then approached Czikora. Czikora used the Internet and a state Division of Motor Vehicles employee to locate the victim's home. Czikora then gave the FBI agent posing as a pitman a map and directions to the woman's home. When arrested by the FBI Czikora immediately agreed to tape a conversation with Tortorici in which he told Tortorici the murder had been carried out as planned. FBI agents then arrested Tortorici in the prison.

**NJ:** On March 9, 2000, Union county jail Lieutenant Richard Wixon, 51, was arrested and charged with sexual assault and official misconduct stemming from his sexual assault and groping of female prisoners at the jail. Prosecutors claim the attacks involve

multiple victims and occurred between 1991 and 1999. Wixon would allegedly extend privileges to prisoners who agreed to his advances.

**NJ:** On September 10, 1999, Lagreta Moore, 38, a guard at the New Jersey State Prison in Trenton was indicted in Mercer county superior court on official misconduct charges. Prosecutors claim Moore had a sexual relationship with a prisoner at the facility.

**NY:** On February 23, 2000, an 11 year guard at the Mount McGregor Correctional Facility, Robert Fifield, 35, pleaded guilty to felony charges of attempted cocaine possession. Fifield was arrested in a police sting operation set up by an unidentified prisoner at the facility. Fifield had agreed to sell and distribute cocaine in Warren county but police wouldn't say if that included the prison. Also arrested on bribery and misconduct charges was Mt. McGregor guard Gary LaBruzzo, 47. LaBruzzo is accused of taking \$50 from a prisoner's relative to bring food and cigars into the prison for the prisoner.

**NY:** On March 9, 2000, former Broome county jail guard Marc Uvanni, 33, was given three years probation after he pleaded guilty to sodomizing two female prisoners at the jail. Uvanni was labeled a sex offender under New York's sex predator law and ordered to pay \$1,155 in fines and court costs.

**OH:** On February 8, 2000, Cuyahoga probation officer Jeffrey Kellon, 33, was found guilty by a jury of raping a 15 year old girl on five separate occasions.

**Peru:** On February 28, 2000, 1,500 prisoners at the Lurigancho prison in Lima rioted to protest bad living conditions, slow court proceedings and repressive laws that affect prisoners. On February 29, 2000, police and army troops with helicopter gunships stormed the prison, killing at least one prisoner and injuring 47. Women prisoners at the Santa Monica prison in Lima had started a hungerstrike on February 24, 2000, on these issues. Police also stormed that prison on February 29. Prisoners across Peru have started hunger strikes, protests and riots on these issues.

**UT:** On March 23, 2000, Fred Van Der Veur, head of Utah's prison operations, announced his retirement effective immediately. Van Der Veur's retirement came after an anonymous letter informed senior prison officials that during a conference of the Utah Correctional Association in Park City, Van Der Veur had urinated from a hotel balcony rather than wait in line to use a restroom. Newspaper accounts depict Van Der Veur as a reformer who for 30 years worked to bring progressive reforms and programs to the Utah prison system.

**VA:** On February 18, 2000, Kevin Van Vleet, 27, was sentenced to 12 years in prison after being convicted in Williamsburg-James City county circuit court of sexually molesting 5 and 7 year old brothers. Van Vleet, a guard at the Sussex II prison in Waverly at the time of his arrest, was convicted of aggravated sexual battery, indecent liberties with a child and assault and battery.

**VA:** On February 18, 2000, Richmond county jail guard Alvin Blake pleaded guilty in Richmond circuit court to two counts of drug trafficking. Blake was videotaped bringing heroin and marijuana into the jail after jail prisoners informed police of Blake's activities.

**VT:** On February 28, 2000, South Burlington jail guards Thomas Charnley, Scott Camley and Mark Leclair were charged in Franklin county court with assault. Prosecutors claim that the guards beat, kicked and stomped a handcuffed and shackled Edward Carrasquillo, a federal detainee being held at the jail on drug charges. The attack was in retaliation for Carrasquillo taking a prison nurse hostage and attacking Charnley with a sharpened toothbrush during the incident. A guard who witnessed the attack reported it to prosecutors. The accused deny the allegations.

**WA:** Announcing the imminent opening of the Stafford Creek Corrections Center, an Aberdeen newspaper told locals that numerous guard positions had to be filled. The newspaper stated that the minimum hiring requirement for prison guards was a valid driver's license, but a high school diploma or GED would be "helpful."

## U.S. Parole Commission Bound by Own Rules

The court of appeals for the Third circuit held that the U.S. Parole Commission (USPC) was bound by its own rules and erred in calculating a prisoner's parole eligibility date. Former CIA agent Edwin Wilson was convicted in 1982 of transporting firearms in interstate commerce for the purpose of committing a felony and conspiring to sell 20 tons of plastic explosives to Libya. While awaiting trial on those charges, Wilson solicited the murder of eight people. The FBI orchestrated the solicitation charges as a sting operation and Wilson was later convicted of those charges as well.

In 1992 the USPC denied Wilson parole, holding that the murder solicitation charges constituted "new criminal behavior." The USPC recalculated Wilson's parole score as if he had committed new crimes while on parole. This effectively doubled Wilson's presumptive sentence and he was scheduled for a reconsideration hear-

ing 15 years later, in 2007. Wilson filed a petition for habeas corpus which the district court denied. The court of appeals vacated and remanded the case to the USPC with directions.

The relevant USPC rule at issue in this case is 28 C.F.R. § 2.36, which plainly states that it applies to new criminal conduct committed by prisoners after they commence their sentence. This was the provision relied on by the USPC to extend Wilson's sentence. However, 28 U.S.C. § 2.10 states that a prisoner's sentence of imprisonment does not actually start until "the date on which the person is received at the penitentiary, reformatory, or jail for service of the sentence." This is identical to language in 18 U.S.C. § 3568 (superseded by § 3585).

The appeals court held that the USPC's interpretation of 28 C.F.R. § 2.10 directly conflicts with the other laws because it is undisputed that Wilson solicited the murders before he was sent

to prison to serve the other sentences. The court held that the USPC was entitled to no deference in its interpretation of its rules since that interpretation directly conflicted with its own rules and federal law.

"Fundamentally, the parole commission must follow its own regulations, which have the force of law .... Faced with the facts before it, the Parole Commission should not have concluded that Wilson's sentence 'commenced' earlier while he was in federal custody. We conclude that the district court erred in finding the rescission guidelines applicable to Wilson's parole eligibility calculation."

Congress switched to determinate sentencing for federal prisoners in 1987. However, federal defendants convicted before that date remain subject to the USPC which determines if and when they will be released. See: *Wilson v. U.S. Parole Commission*, 193 F.3d 195 (3rd Cir. 1999). ■

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# Legal News

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## Prison Realty/CCA Verges on Bankruptcy

by Dan Pens

On March 31, 2000, Prison Realty Trust, Inc. announced operating losses of \$62 million for the year ended December 31, 1999. Its largest subsidiary and chief tenant, Corrections Corporation of America (CCA), reported a net loss of \$203 million for 1999. Independent auditors of both Prison Realty and CCA indicated that "there is substantial doubt about the ability of either company to continue as a going concern."

According to some industry analysts, CCA's troubles began in July 1997

when it spun off a new corporation, CCA Prison Realty Trust Inc., which was structured as a real estate investment trust (REIT) [See: The Poor Get Poorer -- The Rich Get Prisons, PLN Dec. '97]. At that time CCA was a darling of Wall Street, its stock having doubled in value in the first six months of 1997 alone.

In its initial public offering, Prison Realty sold 18.5 million shares at \$21/share, raising a whopping \$388 million. The newly formed REIT immediately shelled out \$308.1 million to purchase nine prisons from its parent, CCA, which it then leased back to CCA.

Some Wall Street analysts expressed concern about the incestuous relationship between Prison Realty (whose stock ticker letters are PZN) and its parent CCA. Their concerns centered on a potential conflict of interest stemming from the fact that many of CCA's chief executive also were named to top PZN posts (CCA's co-founder, Doctor R. Crants was both CCA's Chairman and PZN's CEO). Those concerns failed to deter eager investors, though, who were keen to jump on the profitable prison bandwagon.

Nine months later, in April 1998, the parent corporation, CCA, announced plans to sell itself to its REIT subsidiary. The announcement set off alarm bells on Wall Street. Several investment analysts downgraded CCA's stock. And one firm, Paine Webber, criticized the proposed merger and stated it would result in a "shell of a corporation with very little capitalization behind it." [See: CCA Sells Self, PLN, Aug. '98].

In the weeks following, CCA's stock lost 25 percent of its value. A number of shareholders filed suit, claiming that the proposed merger put the financial gain of CCA corporate officers above the interests of shareholders.

By year's end all but the most strident dissenters had been mollified by CCA's corporate PR machine. The ill-fated merger was approved in December 1998 by a majority of both CCA and PZN shareholders [See: CCA/Prison Realty Merger Approved, PLN, June '99].

The merger, which took effect January 1, 1999, transformed Prison Realty Trust into Prison Realty Corp. (still aka PZN). And CCA became a subsidiary of PZN. Thus, the parent corporation was gobbled up by its child. As a result of the restructuring, the CCA subsidiary ended up a separate privately-held company owned partly by PZN's senior management. Again, concerns about potential conflict of interest were largely ignored.

In May 1999, PZN announced that it would increase the payments it makes to CCA for marketing and filling the new facilities that PZN owns. The increased payments were made retroactive to January 1, 1999. Analysts estimated the increased payments would shift an estimated \$90 million annually into CCA's coffers, at the expense of PZN shareholders. And, remember, the same PZN decision-makers who arranged the payment increase were part owners of the privately-held CCA subsidiary that reaped the benefit.

### Inside

\$820K Award to Informant	3
From the Editor	4
Habeas Hints	6
Czech Prison Protests	8
WA Prisoner Exonerated	9
TX Prison Lockdown	10
Staff Rep. in Medication Hearing....	12
Rape Claims Against Private Prison	15
Slave Labor O.K.	20
Mailbox Rule Discussed	21
Prison Riots in Peru	23
News in Brief	26
Review	31

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## **Prison Realty (continued)**

PZN's shareholders immediately cried foul. Few could now fail to recognize a "potential" conflict of interest stemming from PZN's and CCA's interlocking management structures. Several Wall Street analysts such as Davenport & Co.'s Robert Norfleet said that the increased payments to CCA indicate that PZN's management suffered from "credibility problems."

More shareholder lawsuits were filed, some claiming that PZN senior management secretly decided to increase payments to CCA before releasing PZN's first quarter earnings statements, but waited until *after* filing the earnings statement to announce the decision.

In the week following the revelation of PZN's "credibility problems," its stock plunged 35 percent, from \$22 to \$14.50 a share. Looking to boost investor confidence, Doctor R. Crants was ousted from CCA's management and was replaced by J. Michael Quinlan. But the stock slipped further, to \$11/share, amid concerns that PZN was facing higher interest costs to acquire badly needed operating capital. Because its stock was now in the proverbial toilet, the corporation could no longer easily issue more stock to raise capital. Instead, PZN announced plans for a \$100 million bond issue at 12% interest (considerably higher than the 9 1/4 - 9 1/2 percent rate anticipated).

By November 1999 Prison Realty/CCA was low on cash and losing money. Standard and Poor's put the corporation on its Credit Watch with "developing implications." The company hired Merrill Lynch & Co. to "help it consider strategic alternatives including a restructuring or merger" (business-speak for "call in Wall Street's vultures to circle over the carcass").

On December 27, 1999, Prison Realty announced an agreement with a leveraged buyout group to infuse up to \$350 million into the company. The investors included The Blackstone Group and Fortress Investment Group and Bank of America. Under their plan Prison Realty would give up its REIT status and re-merge with CCA to form a single corporation. The new investors would assume a 30 to 40 stake in the restructured company.

That same day, December 27 1999, Doctor R. Crants resigned as PZN's chairman and CEO. His son, D. Robert Crants III stepped down as PZN's president. Stockholders would have to approve the deal, and if they did it was expected that CCA would get a new \$1.2 billion credit line from Credit Suisse First Boston and Lehman Brothers.

The day the plan was announced, however, PZN's stock fell from \$6.15 to an all-time low of \$4.50 before bargain hunters sent it back up to \$5.25 at day's end. More lawsuits ensued, claiming the proposed transaction was unfair to stockholders whose holdings and control of the company would be diluted.

On February 25, 2000, one of PZN's largest shareholders, Pacific Life Insurance Co., put forward a competing \$200 million equity investment, corporate and debt-restructuring and management reorganization plan. Under the Pacific Life plan, which was agreed to in April, PZN retains its REIT status for 1999; with shareholders slated to receive 1999 dividends in preferred stock rather than cash. By retaining its 1999 REIT status, the Pacific Life plan avoids more than \$140 million in taxes that would have been due under the competing Blackstone Group plan (which would have "de-REITed" PZN retroactive to 1999). Even though the Blackstone group's restructuring plan was ultimately rejected, the group still collected \$22.7 million in fees. Not a bad consolation prize.

PZN's stock rose 94 cents to \$3.38 a share on April 7, the day the Pacific Life plan was adopted. As part of the plan's management reorganization, PZN executives D. Robert Crants III and Michael Devlin resigned, collecting a hefty \$1.3 million in severance and other payments in the process.

The pair each received \$233,750 in severance pay; payments of \$300,000 each in exchange for 150,000 shares of CCA stock they owned, representing 75% of their ownership interest in CCA; \$100,000 each to buy the remaining 25% of their CCA stock after the new Prison Realty-CCA merger transaction closes. None of these payments were made in cash. Instead, the money was applied to settle about \$1million in loans each received from CCA in 1997.

Prison Realty/CCA has more than 73,000 prison beds under contract, or

under development in the United States, Puerto Rico, Australia, and the United Kingdom. The lion's share of CCA's 39 U.S. prisons are located in Texas, which has nine. Kentucky and Oklahoma are the next largest U.S. customers, with four CCA prisons apiece, followed by Colorado, New Mexico and Tennessee which each have three.

The \$200 million restructuring plan had federal and state authorities breathing a collective sigh of relief. Nobody seemed to know what would happen to CCA's prisons if the company defaulted on its estimated \$1.2 billion in loans and was unable to pay guards' salaries and other operating expenses. Colorado and Wisconsin state officials admitted to drawing up contingency plans in the event of a breakdown in CCA's operations, but for "security reasons" were not willing to offer details of those plans.

Wall Street also seemed more optimistic after the Pacific Life bailout. Analysts even predicted that PZN's red ink would turn black in the first quarter of 2000. The mean estimate of analysts surveyed by First Call/Thomson Financial predicted first quarter PZN earnings of 49 cents a share.

On May 15, however, the company posted a net loss of \$27.8 million (or 25 cents a diluted share). First quarter revenue fell to \$17.3 million, compared to \$72 million for the first quarter of 1999. The company said first quarter revenue was reduced to reflect \$71.2 million in "uncollectable lease payments" from its primary tenant, CCA. On the heels of that news, PZN's stock tumbled to \$2.13/share (on May 15th) --less than a tenth of what it sold for just one year previous.

The PZN/CCA re-merger has to be approved by shareholders. It remains to be seen whether the world's largest private prison corporation will remain healthy enough to attract investors and retain employees and customers (i.e. state and federal jurisdictions willing to ship "product" to the corporation). Turnover has always been a big problem with CCA because its guards receive lower pay and benefits than their government-employed counterparts. The lower pay and lack of retirement or other benefits was offset by a "lucrative" (until a year ago, that is) employee stock option plan. The loss in stock value must have a negative effect

in regards to attracting and retaining employees in a tight labor market.

CCA continues to lose money and is plagued by plummeting crime rates, a slowdown in imprisonment growth and a resulting low occupancy rates at some of its prisons. For instance, fewer than half of the 820 beds in its three-year-old Kit Carson prison in Colorado are filled. And the state says it plans to transfer 1,000 of

its prisoners out of Kit Carson and other CCA prisons back to a newly-built state prison in Sterling. ■

Sources: *Dow Jones Newswire, Wall Street Journal, PRNewswire, Bloomberg News, Associated Press, Rocky Mountain News, Milwaukee Journal Sentinel, Nashville Tennessean*

## **\$820,000 Awarded to Informant and Wife for Assault**

A federal district court in New York issued pre- and post-verdict opinions in a negligence action brought by a prisoner and his wife against jail officials. In the pre-verdict ruling, the court held that the plaintiffs were entitled to amend their pleadings during trial and that jail officials have a non-delegable duty to keep prisoners safe. In the post-verdict ruling the court reduced the jury's awards for future pain and suffering and loss of services, finding the awards to be excessive.

While acting as a confidential informant for the Nassau County Sheriff's Department, Neville Rangolan made a controlled buy from Steven King that resulted in King's arrest and conviction. Soon after assisting in King's arrest, Rangolan was also arrested for selling drugs. An entry was placed in the Nassau County Correctional Center (NCCC) computer warning that King and Rangolan must be housed separately. But the entry was overlooked and they were placed in the same jail pod.

The next day, Rangolan was severely beaten by King, requiring emergency brain surgery. Rangolan remained in a coma for three days, suffering from a skull fracture, bleeding from the brain, organic brain damage, seizures and headaches.

Rangolan and his wife, Shirley, sued the sheriff's department, alleging deliberate indifference and negligence. They sought damages for Neville's past and future pain and suffering and for Shirley's loss of services of her husband.

During trial, the Rangolans moved to amend their pleadings to allege that defendants have a non-delegable duty to keep prisoners safe from foreseeable risks of harm. The court granted the motion, finding that the amendment was in the furtherance of justice and would not unfairly prejudice the defendants.

The court also held that defendants were subject to one of the highest non-delegable duties to keep Neville safe. Accordingly, the court concluded, that defendants were not entitled to apportion the liability to King. See: *Rangolan v. County of Nassau*, 51 F.Supp.2d 233 (E.D.N.Y. 1999).

At the close of the evidence the court granted judgment to the defendants on the deliberate indifference claim because plaintiffs failed to prove that anyone at NCCC actually knew that King and Rangolan were housed together. The court granted judgment to plaintiffs on the negligence claim. A jury then awarded Neville \$300,000 for past pain and suffering and \$1.25 million for future pain and suffering. Shirley was awarded \$60,000 for the loss of services of her husband.

Defendants filed a motion for new trial, challenging all three awards. The court denied the motion with respect to the past pain and suffering award but granted it with respect to the other awards.

The court reduced the future pain and suffering award to \$500,000, finding that the award was excessive because Neville's primary future injury was the potential for other seizures and there was no evidence that he would be unable to lead a normal and healthy life after his release from prison.

The court also reduced Shirley's loss of services award to \$20,000, noting that plaintiffs offered no evidence of any services Neville performed for his wife. Accordingly, the court found that the award was excessive for such unproved and speculative loss of services. See: *Rangolan v. Nassau County*, 51 F.Supp.2d 236 (E.D.N.Y. 1999).

Married prisoners who sustain injuries may want to consider including spouses in suits seeking damages for loss of consortium or loss of services. ■

## From the Editor

by Paul Wright

On May 16, 2000, the Prison Activist Resource Center in Berkeley sponsored a fundraiser party for *PLN* in San Francisco. The hip hop/dance party featured DJ Neta, Bamudhi, Local 1200 DJs, Vine Folks and Emma Said. *PLN* co-founder Ed Mead spoke at the party and *PLN* contributing writer Mark Cook appeared via video. The party was a success in that everyone had a good time and it raised \$341.00 for *PLN*'s matching grant fundraiser. We would like to thank the folks at PARC and everyone who helped make the fundraiser party happen.

As noted before, a *PLN* supporter has pledged a \$15,000 matching grant to *PLN*. The matching grant matches donations from non prisoners and fundraisers dollar for dollar, up to \$500 per donor. Donations from prisoners are matched \$2 to \$1. To date *PLN* has received \$326.58 from prisoners and \$3,452 from non prisoners. We have until January 15, 2001 to meet the \$15,000 matching grant. If each of *PLN*'s subscribers donated just \$5 above and beyond the cost of their subscription we would be more than able to meet the matching grant. This additional money is essential for *PLN* to fund its second staff position on a permanent basis. If you haven't donated to *PLN*'s matching grant fundraiser yet, please do so this month.

As *PLN*'s editor, the only thing I dislike more than asking readers for money each month is noting the passing of our friends and supporters. Unlike big publications where obituaries tend to be impersonal, *PLN* is small enough that we have a lot of personal contact with many of our readers and supporters. So that when they die the loss is felt personally by those of us at *PLN* as well as within the larger activist community.

On April 28, 2000, Albert "Nuh" Washington died of liver cancer at the Cocksackie Correctional Institution in New York. Nuh had been imprisoned for 28 years as part of a 25 to life sentence for allegedly killing two New York city policemen. A lifelong fighter against racism and capitalism, Nuh was a member of the Black Panther party and later the Black Liberation Army. As such he was among

those targeted for "neutralization" by the U.S. government. He was convicted of the two murders along with fellow BPP/BLA members Herman Bell and Anthony Bottom, together known as the New York Three. These men are among the longest held political prisoners in the United States as well as the world.

New York governor George Pataki refused to release Nuh from prison due to his terminal illness. Despite his captivity, Nuh never ceased his activism on behalf of human rights and the struggle for progress. As political prisoner Sundiata Acoli said: "Nuh is beloved by all of us PP/POWs and he's highly respected." Nuh was a longtime *PLN* supporter as well. Nuh's loss is mourned by his family, friends and the larger progressive community.

As a final reminder to *PLN*'s prisoner readers, on August 1, 2000, we are increasing *PLN*'s prisoner subscription rates to \$18 per year or \$9 for six issues. This breaks down to \$1.50 per issue of *PLN*. Before August 1, 2000, prisoners can subscribe, renew their subscriptions or extend existing subscriptions at the current rate of \$15 per year. After August 1 we will pro-rate our subscriptions at \$1.50 per issue, i.e. \$15 will get 10 issues instead of the 12 it gets now. So take advantage of the lower rates now!

One thing that would help *PLN* keep its rates down in the future is increasing its circulation. *PLN* currently has around 3,400 subscribers. Once our circulation reaches 5,000 subscribers, our per issue printing costs begin to significantly decrease. Two of *PLN*'s biggest monthly expenses are printing and postage. A higher circulation would allow *PLN* to reduce its per issue costs on both items. Since the cost of printing and postage are constantly going up, this translates into being able to hold our subscription rates where they are now. Since *PLN* is almost entirely reader supported, we need to increase our circulation. You, our readers are the best sales force we have for new subscribers. Encourage your friends, family members and colleagues to subscribe to *PLN*. This will broaden *PLN*'s impact, keep subscription rates down and

raise awareness around prison issues. If you need *PLN* subscription flyers let us know. You can also use the subscription card in each issue of *PLN* for this purpose. We can also send bundles of *PLNs* to distribute at events, in law libraries, etc. Just send \$7 and a mailing label.

Increasing the number of advertisers is another way to keep subscription rates down. *PLN* has never been, and probably never will be, an advertiser supported publication. But there are a number of businesses offering products and services that are of interest to *PLN*'s readership. If you do business with a company that offers services or products that may be of interest to *PLN*'s readership, encourage them to contact *PLN* for advertising information. Or, send us their contact information and *PLN* will follow up on it. This is all stuff each of our readers can assist us with. Enjoy this issue of *PLN*. ■

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# Louisiana Sheriff Busted in Private Prison Scheme

In 1990, Dale Rinicker, then Sheriff of East Carroll Parish (county), Louisiana, saw a lot of money being made in the private "rent-a-jail" business and decided he wanted a piece of the action. So cooked up a scheme that would eventually net him close to half a million dollars before landing him in federal prison.

In April 1990, Sheriff Rinicker asked local attorney and businessman "Captain Jack" Wyly to finance the construction of a private prison in the parish to house state prisoners. Wyly agreed and later that month he formed a corporation, East Carroll Correctional Systems, Inc. (ECCS), which issued 100 shares of stock to Wyly cronies and family members. Thirty-five of the 100 shares were issued to 62-year-old Dorothy Morgel, Wyly's legal secretary of 35 years. Five of those shares were hers, the other thirty were earmarked for Sheriff Rinicker.

Soon after its incorporation, ECCS borrowed money from another of Wyly's corporations, purchased an abandoned school building, and began renovating it into the East Carroll Detention Center (ECDC). That same day, ECCS and the Sheriff's Office entered into a lucrative lease agreement whereby the latter would pay the former from the funds it received from the Louisiana Department of Public Safety and Corrections for housing state prisoners.

A few months later, in August 1990, ECDC began housing prisoners. And the money started rolling in. Until May of 1993, ECCS repaid the construction loans, making no shareholder distributions (except token amounts to cover required tax payments). But after May of 1993, the gravy really began flowing.

Because Sheriff Rinicker's interest in the corporation was blatantly illegal, the parties went to elaborate lengths to conceal the distribution of money to him. Initially, from May 1993 through August 1995, ECCS made payments to Morgel based on her 35% interest (her 5% and Rinicker's 30%).

Although Morgel had a checking account at a Lake Providence bank, where

she lived, in May 1993 she drove 15 miles to Oak Grove where she opened another account. She deposited her ECCS checks in the Oak Grove account. She then wrote checks totalling \$286,025 (generally for less than \$10,000 to avoid currency transaction reporting requirements) payable to Glen Jordan, a friend of Rinicker's. Jordan cashed the checks at a bank in Monroe, Louisiana, where Rinicker's sister, Myra Jackson, worked. Rinicker received the proceeds, giving Jordan a small amount from each check.

After August 1995, the process was streamlined. ECCS started cutting checks (six checks totaling \$54,116) payable directly to Jordan. It was apparently these payments that drew the attention of authorities.

When questioned about these payments by state auditors and the FBI, Jordan, Morgel, and Wyly lied their asses off. But then the authorities "flipped." Jordan and he started cooperating, explaining in detail his role in funneling the illegal payments to his pal the sheriff.

Wyly, Morgel, ECCS, Rinicker and Jackson (but not Jordan) were indicted on federal charges of mail fraud, conspiracy to launder money, and money laundering.

In a pre-trial deal Rinicker pleaded guilty (the charges against his sister were then dismissed) and testified at trial for the Government.

A jury convicted Wyly, Morgel, and ECCS on all counts. Part of the verdict subjected to forfeiture property that had also been charged. Forfeited were: all of ECCS' assets and property, including approximately \$2.8 million in rental payments from the Sheriff's Office; the funds in Morgel's Oak Grove bank account; the approximately \$340,000 paid Rinicker; and the ECDC facility.

Wyly was sentenced to 4 years imprisonment and a \$17,500 fine. Morgel got a year and a day imprisonment and a \$12,500 fine. ECCS was fined \$4.8 million. The court denied the Government's request to be lenient with Rinicker, and sentenced him to 5 years and a \$10,000 fine.

Wyly, Morgel and ECCS appealed, raising a number of issues, including challenging the admission of Rinicker's testimony and the forfeiture order. The appellants argued that Rinicker's testimony violated 18 U.S.C. § 201(c)(2) (prohibiting giving, offering, or promising anything of value to a witness for or because of his testimony), a claim that was swiftly dismissed.

Morgel and Wyly claimed at trial that Rinicker had a violent temper, masqueraded the scheme, and essentially "extorted" them through fear and intimidation into going along. However, the Government presented evidence showing that Morgel and Wyly cheated Rinicker out of \$195,000 and argued that they couldn't have been terribly frightened of Rinicker because they "didn't have a problem clipping him out of \$195,000 of his share," noting that "there is no honor among thieves, obviously, because the thieves were stealing from the thief." Because counsel for Morgel and Wyly failed to object to these arguments at trial, the appellate court dismissed these claims.

As to the fines and forfeitures, the court ruled that the issue of the \$4.8 million fine levied against ECCS was mooted by the fact that all of the corporation's assets were forfeited. The court upheld the forfeitures and vacated the \$4.8 million fine.

The Government, apparently through oversight, failed to present any evidence at trial as to the amount of money seized in Morgel's Oak Grove bank account (said by her counsel at trial to be \$5,840.57 and then later \$15,000) or the source of this money. The court therefore reversed the forfeiture of Morgel's bank account.

Wyly and Morgel's convictions and prison sentences were upheld. Rinicker filed a separate appeal, which was voluntarily dismissed.

There is no mention in the court record as to what became of the East Carroll Detention Facility or its prisoners. Perhaps that will be a story for another day. See: *U.S. v. Wyly*, 193 F.3d 289 (5th Cir. 1999). ■

# Habeas Hints

by Kent Russell

*This column is intended to provide "habeas hints" for prisoners who are considering or handling habeas corpus petitions as their own attorneys ("in pro per"). The focus of the column is habeas corpus practice under the AEDPA - the 1996 habeas corpus law which now governs habeas corpus practice throughout the U.S.*

## 1. Rely on the recent "Williams" decisions from the U.S. Supreme Court to argue for meaningful federal habeas corpus review under the AEDPA.

It was like Christmas in April! The U.S. Supreme Court (USSC), for the past many decades the source of almost nothing but bad news for habeas corpus petitioners, issued two decisions during the 2000 term which suggest that habeas corpus is still alive and well, even under the AEDPA. Both decisions were delivered on April 18, 2000 by the U.S. Supreme Court and, conveniently enough, both are entitled *Williams v. Taylor*.

Of the two cases, the one which puts the most meat on the table is *Terry Williams v. Taylor*, 2000 U.S. Lexis 2837, where the USSC interpreted the crucial test which has to be passed under the AEDPA in order to win on federal habeas corpus. By the time a prisoner gets to federal habeas corpus, s/he has usually made the same basic claim on state habeas corpus ("exhaustion") but has lost there, and is now filing for federal habeas corpus relief in the U.S. District Court. Because of "federalism", the denial by the state courts is entitled to some respect ("deference"). The question is, how much? Under the law prior to the AEDPA, the petitioner simply had to show that the state court's decision was "wrong" as a matter of federal law. That was not necessarily a piece of cake, but it was possible if you could find a federal case which applied federal constitutional law more favorably to your habeas claim than what the state court had done in rejecting the claim. Under the AEDPA, in order to overcome the state

court's denial of your claim, you now have to show that the state court decision was "(1) contrary to", or (2) "involved an unreasonable application of... clearly established Federal law, as determined by the Supreme Court of the United States". Just how much did this AEDPA language change the prior law? That was the important question which the *Terry Williams* case tackled.

Everyone agrees that the AEDPA created at least one obstacle that wasn't there under the old law: the need to show that the state court's decision wrongfully applied principles set forth in a decision by the *U.S. Supreme Court*, rather than just a decision from any one of the federal circuit courts. However, most federal constitutional law is the same throughout the country, and can be traced back to a USSC decision at its source. Therefore, except for those very few instances in which constitutional law differs from one circuit to another, if you've found a federal case that shows the state was wrong in denying your claim on state habeas corpus, the AEDPA simply requires you to trace that decision back to the USSC case that was the basis for the decision in the first place.

What did sharply divide the parties in *Williams* was the rest of the AEDPA language: What did Congress mean by "contrary to" and "unreasonable application of federal law"? First, lawyers for the State of Virginia argued that "contrary to" meant that the prisoner had to somehow find a case in which the USSC had reached a legal result different from the state court in a case involving the *same facts*. Because the Supreme Court only decides a few cases a year, and because the facts of one case are almost always different from another, even if you managed to find a USSC decision that was favorable to your habeas corpus claim on the law, it's almost inconceivable that this USSC case would also happen to involve the *same facts* as your own case. Second, the State's attorneys argued in *Terry Williams* that demonstrating an "unreasonable application" of federal law meant having to show that state court had not only been wrong in applying USSC law, but *so wrong* that no "reason-

able" federal judge anywhere would have decided the case that way. This definition of "unreasonable" virtually required you to get inside the head of any federal judge who agreed with the state court's denial and demonstrate that the judge was not only wrong, but had reached that conclusion frivolously, or in "bad faith".

Had these arguments by the State's attorneys carried the day in *Terry Williams*, winning on federal habeas corpus under the AEDPA would have become about as common as winning the jackpot in the state lottery. Scary as that scenario is, that's pretty much where many of the federal appeals courts were heading, and that's why there was so much riding on the outcome of *Williams*. Fortunately, although it was a wafer-thin majority by a fractured court, the USSC rejected the crippling AEDPA interpretations the State's attorneys were arguing for, and instead held that federal courts must continue to grant federal habeas corpus relief wherever the state court decisions either "conflicted with federal law" or "applied federal law in an unreasonable way". In other words, "unreasonable" in the AEDPA context means "objectively unreasonable", so it is enough to show that the state court denial was "wrong" without also having to demonstrate that the state judges acted in "bad faith" or were "so wrong" that no judge in their right mind would have come out that way. Therefore, when fighting a motion to dismiss on federal habeas corpus:

**Use *Terry Williams* to argue that, under the AEDPA, federal courts still have the power and the duty to disregard state habeas corpus denials that can be shown to be "wrong" under applicable USSC precedent.**

The other *Williams* case, *Michael Williams v. Taylor*, 2000 U.S. Lexis 2836, solidifies the right to evidentiary hearings in federal court under the AEDPA. The AEDPA prohibits evidentiary hearings in federal court where there has been a "failure" to develop the factual basis for the claim in state court. However, *Michael Williams* makes clear that such a "failure" requires some "negligence" or "fault" by the prisoner in not developing the claim in state court. Thus, if the prisoner can

show "due diligence" in attempting to present the factual basis for the claim in state court, even if the state court denies a hearing on the claim, that won't preclude a hearing in federal court pursuant to the AEDPA. Therefore, in regard to evidentiary hearings:

**Do the best you can to develop the facts on state habeas corpus and ask for an evidentiary hearing there, even though you're probably not going to get one. As long as you have been diligent in presenting your factual claim on state habeas corpus, even if the state court denies you a hearing, the AEDPA won't prevent you from getting an evidentiary hearing on federal habeas corpus.**

## **2. Be "safe" in computing the AEDPA statute of limitations.**

The statute of limitations under the AEDPA is one year from the date your state conviction becomes "final" on direct appeal. But exactly when does your conviction become "final" so that the one-year period begins to run? In nearly all federal jurisdictions, in order to allow you to apply for certiorari review by the USSC, you are allowed 1 year, plus an "extra" 90 days after the date your conviction is affirmed by the state's highest court, whether or not you actually file a cert application in the USSC. However, keep these warnings in mind when you are computing the AEDPA statute of limitations: First, don't just assume you will get the 90 extra days in all cases. Note these exceptions to the general rule allowing the 90 extra days: (1) Unless you actually petition for review of your conviction in your state's highest court, you can't apply for cert in the USSC, so your conviction will become "final" when it is affirmed by the state court of appeal, and you won't get the extra 90 days. For California prisoners, this means that, if you don't file a "petition for review" in the California Supreme Court, the AEDPA 1-year statute of limitations will start to run as soon as the "mandate" issues from the Court of Appeal, which is typically 30 days after your conviction is affirmed by the appellate court. (2) Even if you do file a petition for review in the state's highest court, you are not necessarily entitled to the extra 90 days to file for federal habeas corpus unless you have actually

raised "federal constitutional claims" in your state petition for review. In other words, if your petition for review in the state's highest court contained only claims based on state law, but did not raise federal constitutional issues, in many circuits (including the 9th Circuit, which governs California and the Western states), you can't count on getting the extra 90 days over and above the basic 1 year you have from the date your conviction is affirmed by the state's highest court. Therefore, to maximize your AEDPA time and to compute a "safe" AEDPA statute of limitations date:

- **If you appeal your state conviction and lose in the intermediate appellate court, file for review in the state's highest court regardless of how slim your chances may be, and include federal constitutional claims. If you did not file a petition for review in the state's highest court during your appeal, assume that the AEDPA 1-year statute of limitations will start to run immediately from the date the appellate court's opinion affirming your conviction becomes final.**

- **Even if you did apply to the state's highest court for review on your direct appeal, don't assume you'll get the extra 90 days to file under the AEDPA statute of limitations unless your petition for review contained the federal constitutional claims that you are going to present on federal habeas corpus. If not, to be safe, you should file for state habeas corpus within the 1-year period itself, without adding in the extra 90 days.**

Finally, although the AEDPA statute of limitations technically applies only to the time within which you must file a petition for federal habeas corpus, keep in mind that AEDPA also significantly affects the timing of state habeas corpus as well. As a practical matter, you will almost always have to file for state habeas corpus in order to exhaust your state remedies before you file for federal habeas corpus. The AEDPA statute of limitations is "tolled" (the time doesn't run out) while you are properly proceeding through the state courts on state habeas corpus, but you can't get any tolling if the statute of limitations has already run out. Therefore, to preserve your right to file for federal habeas corpus, be sure to file for state habeas corpus when there is still enough time left in the one-year statute of limitations bank to allow for the

preparation and filing of a federal habeas corpus petition after your state habeas corpus petition is denied in state court. Accordingly, I recommend:

**File for state habeas corpus an additional 2 to 4 weeks before the AEDPA 1-year statute of limitations is going to run. That way, if and when your state habeas corpus petition is denied, you'll still have that 2-4 weeks left to do the revisions necessary to prepare and file a timely petition for federal habeas corpus.**■

*[Kent Russell specializes in criminal defense, appeals, and habeas corpus. He is the author of the "California Habeas Handbook" which explains habeas corpus and the AEDPA, and can be purchased (\$20) from the Law Offices of Russell and Russell, 2299 Sutter Street, San Francisco, CA 94115.]*

## **\$1,800 Awarded in PA Retaliation Suit**

On June 25, 1999, U.S. district court judge James McClure Jr. awarded \$1,800 in damages to a Pennsylvania jail prisoner who was retaliated against for complaining about jail conditions. The judge also awarded \$1 in nominal damages to another prisoner with a similar claim.

In 1993 a class action suit was filed challenging conditions of confinement at the Lackawanna county jail in Scranton, Pennsylvania. That suit was settled with the county agreeing to build a new jail. The plaintiffs' claims for compensatory damages went to a jury trial in June, 1999. The jury returned a verdict of \$1,800 in damages to Mark Tourscher and \$1 in nominal damages to Jerome Boykin. The jury held that the jail warden, Thomas Gilhooley, had retaliated against both prisoners for complaining about jail conditions.

The court entered judgment in favor of Tourscher and Boykin and awarded them \$1,800 and \$1 in damages, respectively. The plaintiffs were represented by Angus Love of the Pennsylvania Institutional Law Project. The ruling is unpublished. See: *Hunt v. Gilhooley*, USDC MDP, Case No. 3:CV-93-0846.■

# Czech Prisons Reverberate as Thousands Protest

by Julia Lutsy

An uprising at 21 of the Czech Republic's 33 prisons was touched off on January 10, 2000, when a guard turned off prisoners' television an hour early in the Vinarice prison in Central Bohemia. This gave rise to a hunger strike and, two days later, the protests escalated to include the destruction of bunks, bedding and furniture.

No confrontations with guards were reported, but prisoners' windows soon were festooned with banners proclaiming, "We are people, not animals" and "On hunger strike for our rights." Leaders presented a list of prisoners' grievances. Of 37 demands, the authorities conceded 15 almost immediately as the protests began to spread. The most important were related to severe overcrowding, followed by those related to the lack of work opportunities, poor food, unhygienic living conditions and severe new restrictions which had been instituted at the beginning of the year with respect to the receipt of parcels from families. At the peak of the protests, on January 12, 6,000 prisoners were on the hunger strike.

Though Czech President Vaclav Havel issued an amnesty in 1990 emptying the prisons of their 20,000 prisoners, they are now filled to excess with 23,000. Even the authorities concede that the prisons hold over 17 percent more prisoners than the regulations stipulate; some cells, constructed to hold six persons now hold up to ten. Of the 23,000 Czechs imprisoned, approximately a third are remand prisoners, i.e., they have not been tried. Remand prisoners were among the protesters; they spend nearly twice as much time in prison now as they did before Havel's 1989 "Velvet Revolution." The present prison overpopulation can be traced to the huge crime wave which followed upon the re-introduction of unbridled capitalism in 1998. It is the petty criminals who fill the prisons: Two thirds of convicted Czech prisoners are completing sentences of less than two years. The majority of them are first offenders.

The vast majority of all Czech prisoners have no work and are poorly fed, receiving the equivalent of about \$1

worth of food per day. Frequently they must make do with one change of clothing every other week; they are prohibited from washing clothing in their cells. Hot water for showering is available for only 20 minutes a day in some prisons. All of them had previously been allowed to receive two five kilogram packages (something over 22 pounds) a week. The new regulations cut the ration for convicted prisoners to two five-kilogram packages a *year*. Ostensibly, the reason for the change was to end the flow of drugs to the prisons. After the protests started the government proposed extending the new regulations to include the remand prisoners.

Another general amnesty is not presently under consideration: President Havel is of the opinion that "truth and love" prevail now that "communist oppression" is ended.

Source: *The New Worker*, 28 January 2000, Great Britain

Tele-net

# Restrained Washington Prisoner Exonerated in Assault on Guard

by Terry A. Kupers and Marybeth Dingleddy

Rodney Gitchel had been in 4-point restraints for two months inside the Special Offenders Center (S.O.C.) at the Monroe Correctional Complex in Washington when he struggled free of the restraints and assaulted the next guard who entered his cell. He faced the possibility of five additional years in prison as he stood trial in Everett, Washington, February 27 through March 3, 2000, for assault on a guard. After hearing testimony from Dr. Fred Davis, the prison psychiatrist who ordered Gitchel placed in restraints as part of an experimental "treatment" designed to cure angry outbursts and repetitive rule violations; testimony from fellow prisoners who reported the defendant had suffered unusually harsh deprivations and brutality; and testimony from psychologist Dr. Lee Gustafson and psychiatrist Dr. Terry Kupers, for the defense; the jury voted nine to three in favor of acquittal.

Gitchel had been in prison for approximately four years when the assault occurred. During the first year he had three disciplinary infractions, in the second year he had six, including the one that led to his transfer to the Intensive Management Unit at the Clallam Bay Corrections Center. During his first year in punitive segregation he had 63 infractions, and in the year ending with the assault he had 139. When asked why so many infractions, Gitchel explained: "Once they put me in a strip cell, I don't know what happened, I just kept getting in trouble .... They never told me what I could do to get out, I believed I'd be in there forever." Then, a few days after the assault, he was transferred to another facility in Shelton, WA, and had no infractions for the ensuing year, or until the trial began.

The defense focused on diminished capacity. According to Dr. Kupers, the defendant suffered from SHU Syndrome, a psychiatric condition often seen in prisoners subjected to longterm, punitive solitary confinement. Symptoms include massive anxiety, perceptual distortions, diffi-

culty concentrating, unreality feelings, confusion and intense anger that is difficult to contain. In addition, the defendant was placed in restraints. Dr. Kupers testified that clinical and ethical standards prohibit continual use of restraints. Finally, there was disorientation from sleep deprivation, since staff woke him every hour to adjust the restraints and the lights were always on. Dr. Kupers explained that all of these factors combined to create greatly diminished capacity and prevent Gitchel from forming the intent to harm. The defendant did not even remember the assault. And the fact that the defendant received no further write-ups after being transferred to another prison and placed in general population, lent credence to the notion that the defendant is quite capable of getting along with others and programming successfully if he is not brutalized and provoked.

According to Ms. Marybeth Dingleddy, Snohomish County Asst. Public Defender and Rodney Gitchel's attorney, the problem was that Rodney got caught in a vicious cycle. "Because of his emotional make up, Rodney would react to provocation in a way that many of the other prisoners would not. When the guards would get mad at him and punish him, Rodney would fight back with whatever he had, causing further punishment and more problems. The 'treatment' of Rodney was basically what you would do to a dog as a last resort. How could you not expect a person treated in such a fashion to lash out at whomever was around?"

Ms. Dingleddy continued: "There are a number of things that bother me about this case. First and foremost is the way Rodney was treated by the system. Second, that this case went to trial at all. What was the point? Putting him in solitary confinement, taking away everything, including good time, and tying him down for two months wasn't enough? They wanted to keep him in the system for another five years?" The District Attorney announced there will be no new trial. ■

## Washington Jail Settles Exercise Suit

On October 12, 1999, the King County (Seattle) jail in Washington settled a class action suit concerning the amount of outdoor exercise provided to ultra high security (UHS) prisoners and detainees.

In 1997 a class action suit was filed challenging the classification process and conditions of confinement for prisoners designated by King County jail officials as ultra high security. The practice of ring County jail officials was, and remains, to classify as USH those detainees accused of offenses that receive widespread media attention. USH is a form of administrative segregation where USH prisoners are kept confined to their cells at least 23 hours a day and have no contact with other prisoners. Also challenged in the lawsuit was the fact that USH prisoners did not receive any fresh air or outdoor exercise and were handcuffed whenever they were out of their cells. The suit was filed in ring county superior court in Seattle, Washington.

The settlement applies to the King county jail in downtown Seattle. As part of the settlement, the jail immediately agreed to provide USH prisoners with access to an outdoor exercise yard for one hour per day, three days per week. Effective December 31, 2000, the jail agrees to remodel its exercise yard. and provide UHS prisoners with one hour of outdoor exercise a day, five days a week.

King County denied any liability or wrongdoing. The settlement resolves only the exercise issue. The suit sought only declaratory and injunctive relief. The settlement does not preclude any other UPS prisoner from filing suit seeking money damages or relief on any issues not raised in the complaint. Enforcement and monitoring of the suit will be by the law firm that filed the suit, Browne and Ressler, 821 Second Ave. Penthouse Suit, Seattle, WA 98104-1540. (206) 624-7364.

The challenge to the classification process for UPS prisoners was not pursued due to negative changes in the governing law on this topic. See: *Bachmeir v. King County*, King County Superior Court, Case No. 97-2-289050-SEA. ■

# Another Texas Prison System Lockdown--Politics As Usual?

by Matthew T. Clarke

For the second time in two years, the entire Texas prison system was locked down in a delayed response to isolated incidents in two Texas prisons, once again raising the specter of political motivation for the lockdown. The previous lockdown was reported in the May 1999 issue of *PLN*.

This year's lockdown began on March 16, 2000. According to TDCJ spokesmen, the incident which triggered the lockdown was the murder of a Hispanic prisoner by another Hispanic prisoner at the Coffield Unit which occurred two days before the lockdown. TDCJ's official line was that the prisoner who was killed was a member of a prison gang known as the Texas Syndicate and the prisoner who killed him was a suspected member of another prison gang known as the Pistoleros and the lockdown was necessary to remove any weapons from the prison system and prevent an all out gang war between the two prison gangs. However, a prison system spokesman later admitted that they "still aren't certain whether the killing was a gang-oriented hit or a personal spat" and they don't even know if the prisoner who is charged with the murder really is a gang member.

It is generally accepted as fact that the systemwide lockdown and shake-down had been planned more than a week in advance of the killing. Therefore, the killing is probably more of a convenient excuse than a reason for the lockdown.

As was the case in 1999, the lockdown came in the wake of scathing criticism of Texas Governor and Republican Presidential Candidate George W. Bush and the prison administration in the mainstream media following highly-publicized incidents on Death Row. This year's criticism was sparked by a series of incidents which included: (1) a prisoner spitting out a handcuff key as he was being executed at the Terrell Unit the week before the lockdown; (2) the same prisoner who spit out a handcuff key (who had also been among the prisoners who attempted to escape from Death Row in November 1998) along with another Death Row prisoner taking a Death Row guard hostage at the Terrell

one month before the lockdown; (3) the murder of prison guard Daniel Nagel at the McConnell Unit in December, 1999; and (4) an unrelated disturbance in the administrative segregation section of the McConnell Unit in which one prisoner freed 80 other segregation prisoner who caused extensive damage to the segregation cell block.

These are the only two systemwide lock downs of the Texas prison system in well over a decade. Both came as news media began to question whether the prison system was "out of control". Both were ineffective and inappropriately delayed responses to isolated incidents by a few prisoners in a couple of prisons. Both were probably motivated by a desire of Governor Bush and the prison administration to appear to be "doing something--anything" about the media's fictional "out-of-control" prisons.

Adding to the proof of political motivation behind the two systemwide lockdowns are the serious incidents which have occurred in TDCJ-ID and did not result in an immediate lockdown. These include the following:

® May 6, 2000, a prisoner armed with sharpened sheet metal, took two female medical workers hostage in the medical department at Styles Unit in Beaumont, demanded \$100, cigarettes, and improved conditions of confinement. He wounded an assistant warden, a captain and another guard before being overpowered by guards when they stormed the area.

® April 25, 2000, one prisoner was killed and 31 injured when 300 prisoners armed with gardening tools riot at the Smith Unit outside Lamesa.

® April 13, 2000, a prisoner at William P. Clements Unit in Amarillo held a guard hostage for seven hours before surrendering.

® Feb, 21, 2000, two death row prisoners, armed with sharpened pieces of metal, took a guard hostage at the Terrell Unit in Livingston and held her hostage for 13 hours before surrendering.

® Jan. 15, 2000, a Huntsville guard was stabbed with a pencil which must be surgically removed.

® December 1999, a prisoner at McConnell Unit in Beeville injured a guard and freed 80 prisoners who rioted in the administrative segregation cell-block, causing extensive damage.

® December 1999, a guard was killed by a prisoner at McConnell Unit.

® April 1999, a nurse was held nine hours by two prisoners armed with home-made knives at the Monfort Unit in Lubbock after overpowered guards.

® April 1999, 13 prisoners were stabbed and 4 others taken to a hospital in Wichita Falls after a riot involving nearly 90 prisoners at Allred Unit

® November 27, 1998, six Death Row prisoners attempted to escape and made it as far as the outer prison fence at the Ellis Unit in Huntsville. One escaped the perimeter, but is later found drowned.

® August 1998, a guard was held about an hour by a prisoner with handgun at Holiday Unit in Huntsville.

® June 1997, a prisoner took three hostages at Canton psychiatric facility. He was caught later that day while holding 15-year old boy hostage.

® February 1996, a naked prisoner held a guard hostage for ten hours at a Palestine prison.

® March 1995, a riot involving 400 to 500 prisoners broke out at a Dilley prison. Four prisoners were hospitalized.

All of the above-listed events were serious incidents. Most were much more serious than the official reason for the 1998 systemwide lockdown--a guard being raped at the Robertson Unit in Abilene--and many were more serious than the official reason for the 1999 lockdown--a prisoner killing another prisoner at the Coffield Unit. This indicates ulterior motivation for the lockdowns. In seeking the actual motivation for two similar events when the official reason is implausible, one should ask what the two events have in common. In this case it is: (1) Texas Governor George W. Bush was openly running for President; and (2) the national televised media had picked up on local Texas media stories reporting Texas prisons as "out-of-control" and

stating that the Texas prison system was not being competently run. Within ten days of the national media coverage, the prisons were locked down. In both cases, the official reason for the lockdown seems like an excuse. One can imagine the Bush campaign, in light of the bad national publicity, meeting and deciding "the next time something happens in a Texas prison, lock 'em down. That way it will look like we're doing something. That way the voters will know we're in control."

The political motivation theory is also supported by the results of the lockdowns. The prison system was locked down to search for weapons and other contraband; however, the search revealed little of either. According to a prison system spokesman, the search netted "just routine and heavily nuisance contraband--overage of necessities, like too many (necessities, such as) more pairs of undies than (the prisoner) is supposed to have." In the entire 145,000-man, 116-unit prison system, only one weapon was found.

The circumstantial evidence strongly suggests an improper political motivation behind the systemwide lockdown. Neither the official reason for the lockdown nor the results justify closing the entire prison system for weeks. To Texas prisoners, there is no mystery to why they were locked down. When national television network news began talking about Ponchai Wilkerson spitting out a handcuff key in defiance while being executed and hyperbolated on the incompetent way the "out-of-control" Texas prison system was being run, all knew an ill wind was blowing their way. A governor who is a presidential candidate can hardly afford national publicity about the incompetence in his largest state department. Something, anything, had to be done--even if it made no sense and produced no positive result. One has to wonder what kind of national leader Bush would make if he is willing to distract the public at the expense of helpless people under his control. One shudder to think what might happen is an elected Bush determines a war is necessary to distract the public. We might have another storm in the desert.

Since the lockdown began, Robert Lynn Pruett has been charged with the murder of guard Daniel Nagel. It has also been announced that the morbidly obese guard did not die by bleeding to death through multiple stab wounds--as initially claimed by the prison system--but rather died of a heart attack after receiving two superficial stab wounds to the neck.

Texas Governor and Republican Presidential Candidate George Bush is not the only person using the prison lockdown for personal gain. The Texas guards' union has used the incident to help push through demands for a pay rise. Texas guards are among the lowest paid in the nation, a fact which recently led to chronic understaffing and contributed to the incidents which sparked the lockdown according to guards' union spokesmen. The governor and various state legislators have promised to take up the issue of a pay raise for the guards when the Texas Legislature reconvenes in 2001. The prison system has promised to use funds from the operational budget to effect a pay raise as early as September of this year.

The systemwide lockdown was reduced to "warden's discretion" on March 23rd. Most units remained locked down at least part of the week of March 26th through April 1st, some were still locked down four weeks later.

In truth, the Texas prisons are not "out-of-control." Over the past decade, Texas engaged in a prison building spree, expanding the system fourfold. Now, with more than 145,000 prisoners in the system and many more up in the county jails awaiting transfer to the prisons, the Texas media and public seem unwilling to face the fact that, when you incarcerate more than an eighth of a million people--many with long sentences and little hope of parole--in understaffed prisons, you invite problems. The wonder is that this powder keg of a prison system, paid for by the taxes of the citizens of Texas, loaded by the Legislature's harsh new sentencing laws, and lit by TDCJ's chronic staffing shortage and lack of professionalism, hasn't yet exploded. ■

Sources: *Houston Chronicle*, *Austin-American Statesman*, *San Antonio Express-News*

## **\$1.5 Million Awarded in Arizona Jail Medical Neglect Suit**

On April 15, 1999, a Maricopa County Superior Court jury awarded \$1.5 million in damages to former Maricopa County (Phoenix, Arizona) jail detainee Timothy Griffin. Griffin was imprisoned for driving on a suspended license. Griffin has a history of ulcers. While in the jail Griffin suffered extreme abdominal pain and requested ulcer medication, to no avail. Eventually Griffin was seen by a jail doctor who prescribed Maalox.

At that point, Griffin was unable to eat and the next day began vomiting blood. After waiting two hours in the jail hospital he was taken to a local hospital for emergency surgery to repair a perforated ulcer. Griffin developed peritonitis that required additional surgeries and five hospitalizations. Griffin continues to suffer from bowel problems and chronic diarrhea.

Griffin filed suit in state court claiming jail officials were deliberately indifferent to his serious medical needs. The jury returned a verdict of \$1.5 million in favor of Griffin on his claims of negligence and medical malpractice. The trial judge dismissed the claims against Gail Steinhouser, the jail's medical director and dismissed negligence claims against sheriff Joe Arpaio and Maricopa county. The court denied a motion by the defendants to reduce the damage award, holding the damage award was reasonable. The county has appealed the verdict. Griffin was represented by Maria Crimi Speth of Phoenix law firm Grant, Williams, Lake and Dangerfield. See: *Griffin v. Maricopa County*, Maricopa County Superior Court, Case No. CV-95-16461

The Maricopa County jail is run by Sheriff Joe Arpaio, who purports to be "America's toughest sheriff." Arpaio's antics of housing prisoners in tents, feeding them green baloney, clothing them in striped uniforms and pink underwear, etc., have gained widespread media attention. However, the steady diet of brutality and medical neglect, with the attendant lawsuit payouts, receive little attention outside the pages of *PLN*. ■

## Staff Representative in Medication Hearing Must Have Medical Knowledge

The court of appeals for the Fourth circuit held that federal prison officials can forcibly give a federal pretrial detainee psychotropic drugs without a court hearing. But, if the prisoner has a prison staff member acting as his representative at the hearing, the staff member must be knowledgeable about medical issues.

Richard Morgan was found mentally incompetent to stand trial on federal gun and drug charges. He was sent to a federal prison for psychiatric treatment. The Bureau of Prisons (BOP) issued an administrative order under 28 C.F.R. § 549.43 that Morgan be forcibly medicated. Morgan sought judicial review of the order. He claimed that § 549.43 does not adequately protect his due process rights because the forcible medication order should be given by a judge after a hearing, not by BOP staff. The district court upheld the administrative order. The court of appeals vacated and remanded.

The appeals court held that 28 C.F.R. § 549.43 was constitutional and substantially complied with the dictates of *Washington v. Harper*, 110 S.Ct. 1028 (1990). Under *Harper*, prisoners can be forcibly medicated after an administrative hearing by prison officials. A court hearing, and order, is not required.

The court vacated and remanded however, because it did not appear that the BOP had complied with 28 C.F.R. 549.43. The rule requires that, on request, prisoners may have a staff representative knowledgeable and educated enough to understand the psychiatric issues involved in the hearing, represent them. In this case, there was no evidence that the prison guard who acted as Morgan's staff representative "had the requisite credentials" or if Morgan suffered prejudice as a result of this shortcoming. The court noted the record showed minimal participation by the guard on Morgan's behalf and likened his role to that of a "lay witness."

"...Once the BOP established the administrative framework set forth in section 549.43, Springfield medical personnel were bound to follow it." The court observed that an agency's failure to provide individuals with the procedural safe-

guards mandated under its own regulations may invalidate the final administrative determination. Thus, if Morgan did not have an adequate staff representative at his hearing, the order to forcibly medicate him may be invalid. The

court remanded the case for further development of a factual record. The same argument may also be useful in cases involving disciplinary hearings where a liberty interest is also at stake. See: *United States v. Morgan*, 193 F.3d 252 (4th Cir. 1999).■

## Brown Ad-Seg Due Process Claim Remanded For Hearing

By Ronald Young

The Court of Appeals for the District of Columbia circuit held that a prisoner who received ten months of administrative segregation during a housing reassignment hearing did not receive the minimal process required by the Due Process Clause. The court also held that remand was required to permit the district court to develop the record to determine whether the prisoner's ten-month stay in ad-seg imposed an atypical and significant hardship on a prisoner serving a comparable sentence.

This case is a remand from the court of appeals for the D.C. circuit and was previously reported in the November 1998 *PLN*. See: *Brown v. Plaut*, 131 F.3d 163 (D.C. Cir. 1997). Ernest Brown, a prisoner at Lorton Prison, alleged that he was not given prior notification of a hearing before the Housing Board where he was found guilty of being in possession of a tooth brush fashioned into a shank. The district court originally dismissed Brown's claims, but the court of appeals vacated the dismissal and remanded it back to the lower court to determine whether, assuming that Brown did have a cognizable liberty interest, he had been afforded adequate due process under *Hewitt v. Helms*, 459 U.S. 460, 103 S.Ct. 864 (1983).

The court concluded that Brown did not receive adequate process under *Hewitt*, finding that he did not receive prior notice of the hearing or presented with the charges against him. This conclusion was supported by the finding that all parties agreed that the Housing Board hearing was never intended to address Brown's guilt or innocence of the disciplinary charges against him.

Because Brown did not receive the minimal process required by the Due Process Clause for deprivation of a protected liberty interest, the court stated that it must determine whether Brown in fact had a protected liberty interest in avoiding ten months of ad-seg. In order to do this the court said it would rely on the recent decision in *Hatch v. District of Columbia*, 184 F.3d 846 (D.C. Cir. 1999). Using the atypical and significant hardship standard of *Sandin v. Connor*, 515 U.S. 472, 115 S.Ct. 2293 (1995), the D.C. circuit held that whether an alleged restraint constituted an atypical and significant hardship must be determined by comparing the challenged restraint with the most restrictive confinement conditions imposed on prisoners serving similar sentences, as well as the duration of the restraint.

The court of appeals in *Hatch* chose ad-seg as its baseline for comparing the confinement at issue. The district court therefore found that the conditions of Brown's restraint in ad-seg did not impose an atypical and significant hardship because it meets the baseline standard. The court found that the only remaining question is whether the duration of Brown's ten-month ad-seg stay was an atypical and significant hardship on prisoners serving a comparable sentence. In order for the court to reach a reasoned and informed conclusion on this issue, it was found that supplemental evidence and perhaps an evidentiary hearing are required.

The court granted Brown's motion for partial summary judgement and ordered further proceedings on the issue of whether he had a protected liberty interest. See: *Brown v. District of Columbia*, 66 F.Supp.2d 41 (D.D.C. 1999).■

## Administrative Exhaustion not Jurisdictional Satisfied by Letters to Defendants

The court of appeals for the Sixth circuit reiterated that the Prison Litigation Reform Act (PLRA) requires administrative exhaustion in all cases, even where prisoners seek money damages not available via prison grievance systems. The court also held that the exhaustion requirement is not jurisdictional and that a prisoner exhausted his administrative remedies for PLRA purposes by writing letters to the prison official defendants instead of using the grievance system.

George Wyatt is an Ohio state prisoner who was raped by another prisoner. Wyatt sued various prison officials for money damages claiming they violated his Eighth amendment rights, first by placing him in a cell with a known rapist, and then denying him adequate medical and psychological care after the rape. 42 U.S.C. § 1997e(a) of the PLRA states that "No action shall be brought with respect to prison conditions under section 1983 of this title, or any other federal law, by a prisoner confined in any jail, prison or other correctional facility until such administrative remedies as are available shall be exhausted." The district court dismissed the suit because Wyatt did not exhaust the prison grievance system. The appeals court reversed and remanded, finding that while exhaustion is required in all cases, Wyatt had substantively exhausted his claims administratively by writing the prison official defendants about the rape and subsequent lack of treatment.

The Fifth, Ninth and Tenth circuits have held that prisoners seeking only money damages are not required to exhaust administrative remedies if the prison grievance system does not provide for money damages as a remedy. See: *Whitley v. Hunt*, 158 F.3d 882 (5th cir. 1998); *Garrett v. Hawk*, 127 F.3d 1263 (10th Cir. 1997) and *Rumbles v. Hill*, 182 F.3d 1064 (9th Cir. 1999). Other circuits, including the Sixth, have held that administrative exhaustion is required in all prison cases, regardless of whether damages are sought or available via the grievance system. See: *Alexander v. Hawk*, 159 F.3d 1321 (11th Cir. 1998), *Perez v. Wisconsin DOC*, 182 F.3d 532 (7th Cir. 1999) and

*Brown v. Toombs*, 139 F.3d 1102 (6th Cir. 1998).

In *Brown*, the Sixth circuit made it a pleading requirement that prisoners filing prison and jail condition lawsuits allege, and show, that they have exhausted all available administrative remedies. Prisoners should attach the actual grievance forms to their complaint. The court reiterated this opinion: "So long as the prison system has an administrative process that will review a prisoner's complaint even when the prisoner seeks monetary damages, the prisoner must exhaust his prison remedies."

"...we hold that prisoners must exhaust administrative remedies even in money damages cases if the prison system does not altogether refuse to review the prisoner's allegations on which the claim is based." The court held that § 1997e(a) is not jurisdictional, it governs the timing of when the suit can be filed, not whether the court can hear it. But, the exhaustion requirement is still mandatory.

"Because the exhaustion requirement is not jurisdictional, district courts have some discretion in determining compliance with the statute." In this case, Wyatt was raped before the PLRA's enactment but filed the lawsuit after the law was enacted, at which time a grievance would have been time barred. However, Wyatt sent prison officials numerous letters complaining about the rape and the lack of medical care afterwards.

The court held that under these circumstances Wyatt had "substantially complied with the exhaustion requirement." While he did not use the prison grievance system, he administratively exhausted his claims for PLRA purposes "by giving written notice on several occasions to prison officials." The defendant prison officials were aware of Wyatt's complaints and responded to them. The court reversed and remanded the case with instructions to the lower court to decide the merits of the case.

PLN has consistently advised its prisoner readers to exhaust all administrative remedies to avoid procedural delays, hurdles and dismissals. In addition to using the grievance system it is also a good idea to send letters to responsible prison officials in order to establish

their liability and create a documentary paper trail for the ensuing litigation. As a general rule, prisoner litigants stand to benefit by administratively exhausting their claims before they file suit. See: *Wyatt v. Leonard*, 193 F.3d 876 (6th Cir. 1999). ■

### Texas Supreme Court Invalidates TDCJ-ID VitaPro Contract

The Texas Supreme Court reversed a lower appellate court's decision and held that the trial court had ruled correctly when it invalidated TDCJ-ID's contract with VitaPro Foods, Inc. of Montreal, Canada, for a soy-based meat substitute. The product was unpopular among prisoners and guards who claimed it made them sick.

The Texas Supreme Court ruled that only the original contract for a "trial" shipment costing \$62,000 was legitimate. That contract was illegally amended four times until it reached a project cost between \$33 million and \$40 million. The trial court had held that the amendments, done without competitive bidding, were illegal and unenforceable. The Austin Court of Appeals had reversed the trial court, holding that, since "agricultural commodities" and raw materials were exempted from the competitive bidding requirement, VitaPro should be given a hearing on whether it was an agricultural raw material. The Texas Supreme Court held that VitaPro, which contains a mixture of soybeans, dehydrated vegetables, and flavoring, was clearly not an "agricultural commodity" or raw material. Thus, the trial court was correct in invalidating the contract.

Former Executive Director of TDCJ, James "Andy" Collins and VitaPro president Yank Barry were indicted on counts of federal felony conspiracy, bribery, money laundering and other charges stemming from the contracts and that VitaPro paid Collins \$20,000 and a \$1,000/day consulting fee while he was still employed by Texas. Collins's trial has been postponed indefinitely; Barry's is also pending. See: *Dept of Criminal Justice v. VitaPro Foods Inc.*, 8 SW.3d 316 (Tex. 1999). ■

Sources: *Houston Chronicle*. *San Antonio Express*

# Sixth Circuit Orders Retrial of Retaliation Suit

by Matthew T. Clarke

The Sixth Circuit court of appeals has ordered the retrial of a lawsuit by the surviving mother of a deceased ex-prisoner against a guard who allegedly retaliated against her son because the mother requested the guard's name and badge number.

In 1993, Stephen Neal was a Michigan state prisoner at a facility that allowed prisoners to leave the facility to work, to seek work, and for visits. On a Friday, Neal left to look for work, returning on time later that day. On Sunday, Neal arrived at the sign out desk where Harry Green, a guard, was working. Green accused Neal of having been AWOL since Friday. Neal asked Green to confirm Neal's presence at the prison since Friday with two other guards. Green refused, canceled the visit, but allowed Neal to go to the parking lot and explain the situation to his waiting mother, Marcellette Reynolds. Shortly thereafter, Reynolds approached Green and requested his name and badge number. Green refused to give them. The two guards who knew Neal had been at the prison then intervened and Neal was given his visit.

Green wrote two major disciplinary reports against Neal: for threatening behavior and incitement to riot. As a result, Neal was transferred to a higher-security prison. At a disciplinary hearing, Neal was found not guilty on the offenses charged by Green, but guilty of the minor offense of excessive noise. Despite his immediate eligibility for return to the lower-security prison, Neal was not returned for approximately one year.

Neal filed suit against Green under 42 U.S.C. § 1983 for filing false misconduct reports. Before trial, Neal died while on parole and Reynolds was substituted as the personal representative of his estate.

During the trial Reynolds attempted to introduce a report on the incident prepared by Christopher Oden of the Legislative Corrections Ombudsman's Office. The court ruled the report inadmissible due to "highly inflammatory, highly prejudicial statements that were not subject to cross-examination." Oden was allowed to testify about his conclu-

sions regarding the misconduct reports during the trial.

After the close of evidence, the jury was given a instruction asking whether Reynold's statement to Green was *the* motivating factor behind Green's writing the disciplinary reports. Reynolds did not object to the instructions. The jury sent out a note asking whether this meant Reynold's statement was a factor or *the* factor. Reynolds requested a supplemental instruction clarifying that the jury need only find that Reynolds statement was a motivating factor, not the only motivating factor. The judge refused to clarify the instruction. The next day, the jury sent out another note, stating that they could not reach agreement on the motivating factor issue and requesting clarification. Again the judge refused to clarify, but did give the jury an instruction to work hard and try to reach a consensus. The parties later agreed to allow a verdict by six of the eight jurors. The third day, the jury sent out a final note requesting clarification by asking whether the judge or lawyer had written the instructions. Once again, the judge refused to give a supplemental instruction. Shortly thereafter, the jury returned a verdict against Reynolds, answering the question of whether Reynolds's statement was a motivating factor no.

Green appealed both the court's refusal to allow the ombudsman's report into evidence and the court's refusal to give a supplemental jury instruction. The Sixth Circuit held that, whereas Rule 51, Federal Rules of Civil Procedure requires that the party object to the instruction before it is given to the jury if the party wants to challenge it on appeal, it does not preclude the review of the unobjected-to instructions under the "plain error" doctrine. "Plain error is an obvious and prejudicial error that requires action by the reviewing court in the interest of justice." in this case, the jury brought to the court's attention a problem with the instruction which "misapplies the law as to a core issue in the case" which probably "caused the jury to deliberate under the wrong legal standard and probably af-

fected the outcome of the trial." "Because the time at which the objection was made rendered the legal error curable by the district court without significant prejudice or inefficiency" it was plain error for the district court to fail to correct the instruction.

However, the Sixth Circuit held that it was not error for the district court to refuse to allow the ombudsman's report into evidence because it contained Neal's statements and speculations about Green's motivations and these statements lack reliability and could not be subject to cross-examination. The report also contained hearsay statements by Reynolds and the two guards who intervened. Such "hearsay within hearsay" is inadmissible unless both levels of hearsay fall within an exception to the hearsay rule which, in this case, they did not. Therefore, the case was returned to the district court for a new trial. See: *Reynolds v. Green*, 184 F.3d 589 (6th Cir. 1999). ■

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# Showing Of Malice Under Eighth Amendment Excessive Force Test Not Required For Sexual Assault Claim Against Private Prison

By Ronald Young

Holobird

The court of appeals for the Tenth Circuit held that it was plain error to instruct a jury that, to find a prison guard liable on an excessive force claim where the guard allegedly raped a prisoner, it had to find both that he forced the prisoner to have sexual intercourse and that the use of force was applied maliciously and for the purpose of causing harm. This was an appeal of a case previously reported in *PLN*. See: *Giron v. Corrections Corporation of America*, 14 F.Supp.2d 1252 (D.N.M. 1998).

Tanya Giron, a prisoner at the New Mexico Women's Correctional Facility (NMWCF), brought a 42 U.S.C. § 1983 action against NMWCF prison guard Danny Torrez, Warden Thomas Newton, and Corrections Corporation of America (CCA) which operates the NMWCF under contract with the State of New Mexico. Ms. Giron alleged, among other things, that her being raped by Torrez "constituted excessive force in violation of her Eighth Amendment rights."

A jury returned a verdict for the defendants and the district court entered judgement. Ms. Giron appealed, contending among other things that the jury instruction on her § 1983 claim was improperly given by the district court. The jury instruction stated in pertinent part that in order to find Torrez liable under § 1983 "the jury must find: ... that the use of force was applied maliciously and for the very purpose of causing harm." The appeals court agreed with the defendants that Ms. Giron's attorney failed to make timely objection to the jury instructions and therefore failed to preserve the error. In this instance the appeals court found it necessary to use the "plain error" standard for review.

The appeals court "will only reverse under the plain error standard in an exceptional circumstance-one where the error was 'patently plainly erroneous and prejudicial.'" In Ms. Giron's case, however, the appeals court believed that "the trial court misconstrued the principles underlying the excessive force test articulated by the Supreme Court," see: *Hudson v. McMillan*, 503 U.S. 1, 112 S.Ct.

995 (1992); *Whitley v. Albers*, 475 U.S. 312, 106 S.Ct. 1078 (1986), and its confusing excessive force instruction resulted in fundamental injustice to Ms. Giron."

"Ordinarily, an excessive force claim involves two prongs: (1) an objective prong that asks 'if the alleged wrongdoing was objectively harmful enough to establish a constitutional violation,' and (2) a subjective prong under which the plaintiff must show that 'the officials acted with a sufficiently culpable state of mind'" (internal quotes omitted). "The subjective element of an excessive force claim 'turns on whether force was applied in a good faith effort to maintain or restore discipline or maliciously and sadistically for the very purpose of causing harm.'"

The appeals court found that based on the jury instruction, "the jury could have decided that ... Torrez forced Ms. Giron to have sex with him, but did not apply force maliciously and with intent to cause harm, and thus he was not liable under § 1983." The appeals court found such potential reasoning to be wrong and stated, "Where no legitimate penological purpose can be inferred from a prison employee's alleged conduct, including but not limited to sexual abuse or rape, the conduct itself constitutes sufficient evidence that force was used 'maliciously and sadistically for the very purpose of causing harm.'" The appeals court went on to hold that "since Ms. Giron had to prove that ... Torrez forced her to have sex with him, she should not have faced the additional hurdle of showing that the coercion involved malice under a test primarily designed for a prison guard's use of force to maintain order."

Therefore, the appeals court found plain error in the jury instruction "because it was confusing and patently prejudicial to the outcome of the excessive force claim." The judgement for Torrez on the § 1983 excessive force claim was reversed and remanded back to the district court for a new trial. See: *Giron v. Corrections Corporation of America*, 191 F.3d 1281 (10th Cir. 1999). ■

# Liberty Interest In New York Work Release

By Ronald Young

The court of appeals for the Second circuit held that a New York prisoner has a protected liberty interest in her continued participation in a work release program, and entitled to a hearing which states the reason for her removal from the program, prior to her formal jurisdictional removal. The court also held that only the chairperson of the committee that held the hearing was liable for a due process violation, and was not entitled to qualified immunity. But the court also held that the prisoner was entitled to only nominal damages.

Young Ah Kim, a New York state prisoner, brought an action against several New York state Department of Correctional Services (DOCS) personnel, including Chairperson Delores Thornton and Chairperson Marjorie L. Hurston, both overseeing Temporary Release Committees. Hurston was at Parkside Correctional Facility and Thornton at Bedford Hills Correctional Facility.

After serving part of her sentence, Kim was placed in the Temporary Release Program (TRP). To participate in the program, Kim was transferred in January 1995, from Bedford Hills to Parkside, a TRP facility in New York City, where she was eventually permitted to be released from physical confinement and live at home while continuing to work. In February 1995, Kim failed a random urinalysis test required of all work release program participants. Her participation in work release was terminated and she was eventually sent back to Bedford Hills.

At the time of her transfer to Bedford Hills, Kim was suppose to be seeing the parole board. But she had not technically been transferred and was still under the jurisdiction of Parkside. To remedy this, Parkside held a hearing on April 10, 1995, to remove Kim from the jurisdiction of the Parkside TRP. The committee voted to remove Kim from the Parkside TRP because she was "medically unsuitable." Kim did not receive notice of the hearing, was not present at it, and received no statement of the reason for her removal.

In March 1996, Kim filed-suit contending that the defendants deprived her of a liberty interest without procedural due process. Kim won a favorable jury

verdict against Hurston and Thornton, awarding her compensatory damages of \$2,750 and punitive damages of \$2,000 each against the two defendants. After the jury was excused, the district court judge granted a Rule 50 motion for judgment as a matter of law in favor of Hurston and Thornton so that Kim took nothing. She appealed.

The appeals court found that while Kim participated in the phase of the TRP in which she lived at home and worked at a job, she enjoyed a liberty interest, loss of which imposed a sufficiently "serious hardship" to require "at least minimal due process." This satisfied the "atypical and significant hardship" standard of *Sandin v. Conner*, 515 U.S. 472, 115 S.Ct. 2293 (1995), and paralleled a similar Oklahoma case as Kim's in which the U.S. Supreme Court found such programs to require the procedural protections outlined in *Morrissey v. Brewer*, 408 U.S. 471, 92 S.Ct. 2593 (1972) concerning parole revocations. See: *Young v. Harper*, 520 U.S. 143, 117 S.Ct. 1148 (1997).

The issue of liability was "somewhat confused" due to a failure during the trial to distinguish between the physical removal of Kim from the TRP after she failed the urinalysis on March 3 or 4, 1995, and the formal jurisdictional removal, which took place on April 10, 1995. The appeals court stated, "The distinction between physical and jurisdictional removal bears on the issue of liability because of the change that occurred in the reason for removal. Since the physical removal was prompted by the report of the urinalysis, there was no opportunity for prior notice. Kim had no procedural due process right to prior notice of the physical removal," since it occurred "in the context of an emergency."

Kim, however, "was entitled thereafter to a hearing" to dispute the ground for removal. Also, between the time of Kim's physical removal and jurisdictional removal, the reason for removal was changed from the positive urinalysis report to Kim's mental health classification that was downgraded after the physical removal.

"When procedural due process requires an explanation of the ground for

termination of a liberty interest, it requires a statement of the actual ground, and if an initial ground is changed," as it later was in Kim's case, "the person deprived of liberty is entitled to know the new ground."

The appeals court concluded, "Liability thus exists for the lack of notice of the April 10, 1995, hearing and the failure to inform Kim of the correct reason for the removal from the TRP." However, only Hurston was found to be liable and her qualified immunity defense could not stand. The appeals court went on to determine that "the denial of due process in this case was a technical violation that resulted in no compensable damages. The punitive damage award was also vacated. See: *Kim v. Hurston*, 182 F.3d 113 (2nd Cir. 1999). ■

## Fire Mountain Gems

## No Pretrial Appeals of Motions to Dismiss

The Eighth circuit court of appeals held that it had no jurisdiction to hear interlocutory appeals on issues other than qualified immunity. The court also held it will review FRCP 60(b) motions for abuses of discretion.

Emmit Broadway was a pretrial detainee housed in a jail run by the Arkansas Department of Corrections (DOC). He filed suit claiming he was not provided with adequate medical care while in the jail. The defendants filed motions to dismiss on the basis of qualified immunity and arguing that under FRCP 12(b)(6), Broadway had failed to state a claim upon which relief could be granted. The district court denied both motions but did dismiss one defendant. The remaining defendants then filed a "motion for reconsideration," claiming the court erred in denying their other motions. The district court construed it as a FRCP 60(b) motion and denied relief. The defendants then filed an interlocutory appeal.

The court of appeals held that it had no jurisdiction to review the defendants' arguments regarding their respondeat superior and Rule 12(b)(6) claims because those issues cannot be raised on interlocutory appeals. Instead, the issues must be appealed only after a final order has been entered disposing of the entire case.

However, appellate courts can hear interlocutory qualified immunity appeals. The court held that the district court did not abuse its discretion in denying the defendants' "motion for reconsideration." "In their 'motion for reconsideration,' defendants did nothing more than reargue, somewhat more fully, the merits of their claim of qualified immunity. This is not the purpose of Rule 60(b). It authorizes relief based on certain enumerated circumstances (for example, fraud, changed conditions and the like). It is not a vehicle for simple reargument on the merits. This ground alone is sufficient to prevent a holding that the district court abused its discretion in denying the motion."

In its brief ruling the court did not discuss the details of Broadway's claims, nor the merits of the claims or the defendants' argument. See: *Broadway v. Norris*, 193 F.3d 987 (8th Cir. 1999). ■

## Individual Analysis Required For Diabetic Class Action Damage Award

By Ronald Young

The court of appeals for the Third circuit held that the lower court erred in holding that all members of the plaintiff class past, present, and future of insulin-dependent diabetic New Jersey prisoners alleged violation of their Eighth Amendment rights.

In 1990, Darryl Rouse, an insulin-dependent diabetic then incarcerated at the Adult Diagnostic and Treatment Center (ADTC) in New Jersey filed a 42 U.S.C. § 1983 action against William Fauver, Commissioner of the New Jersey Department of Corrections; William Plantier, Acting Superintendent of the ADTC; and several other doctors and nurses. "Rouse alleged that the defendants had subjected him to cruel and unusual punishment by failing to provide him with adequate medical care. In 1994, Rouse amended his complaint and sought class certification, declaratory and injunctive relief for class members, and monetary relief for present insulin-dependent diabetic" prisoners.

The district court, in 1996, certified a class consisting of all former, present, and future insulin-dependent diabetics incarcerated at the ADTC. For the purpose of classwide damages, a class consisting of all former and present insulin-dependent diabetics incarcerated at ADTC was also certified. After hearing expert testimony from both sides, the district court found that the plaintiffs "had demonstrated the existence of material fact issues on whether the plaintiffs as a class had received constitutionally adequate medical care and constitutionally appropriate diabetes meals; and that the defendants had been aware of the risks of such inadequacies but had disregarded them. On the issue of qualified immunity, the district court held that the defendants had failed to demonstrate the reasonableness of their actions since the right at issue was clearly established at the time. The court rejected their qualified immunity defense also.

The appeals court found that the lower court erred in concluding a wholesale violation of the plaintiff's Eighth Amendment rights. It also found that at least two distinct groups of diabetics

existed—"stable" and "unstable"—and on remand the lower court should address the specific needs of each group, then consider the appropriate level of care due under the Eighth Amendment.

The appeals court further instructed the district court to "analyze separately the situation of each of the defendants who is sued in an individual capacity," and "determine whether each of the individual defendants acted in an objectively reasonable manner with respect to the particular needs of each relevant group of plaintiffs." See: *Rouse v. Plantier*, 182 F.3d 192 (3rd Cir. 1999). ■

## \$97,500 Awarded in NY Prison Work Accident

On July 19, 1999, the New York Court of Claims awarded \$97,500 in damages to Fred Thomas for an eye injury he suffered while imprisoned in a New York state prison in 1993.

Thomas, then a 33-year-old prisoner at the Elmira Correctional Facility, was injured when an electric drill bit shattered and a piece struck him in the right eye. He was taken to a hospital where a physician removed substantially all of the vitreous fluid, removed the drill bit fragment with a laser, and burned the immediate area of the retina where the fragment had been impregnated, leaving Thomas with 20/400 vision in the eye.

At a prior trial the State of New York was found 65% liable for the occurrence of the accident, with Thomas bearing the remaining liability. The court awarded \$50,000 for past pain and suffering and \$100,000 for loss of visual acuity; the total award was reduced by 35% to a total of \$97,500. See: *Fred Thomas v. State of New York*, Binghamton County Court of Claims, Claim No. 90205. ■

Source: *The New York Jury Verdict Reporter*

## Field 'Sleep Out' Without Adequate Toilet Facilities States An Eighth Amendment Violation

By Ronald Young

The court of appeals for the Fifth circuit held that, for qualified immunity purposes, a prisoner who was forced to spend the night outdoors in a work field without adequate bathroom facilities and shelter demonstrated a violation of his clearly established Eighth Amendment rights. The court also held that the warden and assistant warden were not entitled to summary judgement based on qualified immunity.

Devlin L. Palmer, a Texas state prisoner, filed a 42 U.S.C. § 1983 action against TDCJ-ID Director Gary Johnson, Warden Bryan Hartnett, and Assistant Warden Oscar Mendoza. Palmer alleged that in retaliation for some profane remarks made to a field sergeant by members of a field squad he was in, Palmer and the rest of the squad were ordered by Assistant Warden Mendoza to remain seated in the field. Later that afternoon Warden Hartnett ordered the 49 prisoners in the squad to remain overnight in the field. They were confined to a 20-by-30-foot area. There were no toilet facilities and the prisoners were denied shelter, jackets, blankets, "or other means of keeping warm" even though the temperature dropped below 59 degrees that night.

"The district court dismissed with prejudice all of Palmer's claims against Johnson as well as his claims against Hartnett and Mendoza in their official capacities." Hartnett and Mendoza, however, were found "to be liable in their individual capacities for violating Palmer's rights under the Eighth Amendment." The district court "enjoined them from forcing Palmer to endure any future sleep-outs without adequate shelter or clothing," and ordered Palmer's claims for monetary damages against Hartnett and Mendoza in their individual capacities to proceed to trial." After their motion for reconsideration was subsequently denied, Hartnett and Mendoza appealed.

Palmer's allegations that he suffered insect bites and missed a meal did not rise to a "cognizable constitutional injury," according to the appeals court. However, it did find that depriving Palmer of the use of a bathroom for 17 hours, with his only option being "to urinate and

defecate in the confined area" that he shared with 48 other prisoners, did "constitute a 'deprivation of basic elements of hygiene.'" The Fifth circuit has previously observed that such prison conditions "are so 'base, inhuman, and barbaric' that they violate the Eighth Amendment." See: *Novak v. Beto*, 453 F.2d 661 (5th Cir. 1971).

Prison officials attempted "to downplay the degree of the claimed deprivation," emphasizing that "the challenged conduct lasted only seventeen hours." The appeals court held, however, that "in addition to duration ... we must consider the totality of the specific circumstances that constituted the conditions of Palmer's confinement, with particular regard for the manner in which some of those conditions had a mutually enforcing effect." See: *Wilson v. Seiter*, 501 U.S. 294, 111 S.Ct. 2321 (1991).

The appeals court also found that "the totality of the specific circumstances presented by Palmer's claim-his overnight outdoor confinement with no shelter, jacket, blanket, or source of heat as the temperature dropped and the wind blew, along with the total lack of bathroom facilities for forty-nine inmates sharing a small bounded area-constituted a denial of 'the minimal civilized measure of life's necessities.'" See: *Farmer v. Brennan*, 511 U.S. 825, 114 S.Ct. 1970 (1994).

As for the question of qualified immunity, Palmer's assertion that the next morning "Warden Hartnett threatened another night outdoors to 'freeze again' if they refused to work" was sufficient for the required showing of deliberate indifference, and demonstrated a violation of Palmer's clearly established rights under the Eighth Amendment." This defeated Hartnett and Mendoza's claim of qualified immunity.

The district court's denial of Hartnett and Mendoza's motion for summary judgement based on qualified immunity was affirmed. Their challenges of the facts or the grant of summary judgement in favor of Palmer on liability were dismissed. The case was remanded back to the district court for further proceedings. See: *Palmer v. Johnson*, 193 F.3d 346 (5th Cir. 1999).

## Arizona Jury Acquits CCA Escapees

Two Alaska state prisoners on trial for a 1996 escape from a private prison were acquitted by an Arizona jury. The prosecution was undoubtedly stunned by the verdict in what was considered to be an open and shut case. However, the prosecutor in the case had no post-verdict comments for the press.

Jurors returned the not guilty verdicts on February 18, 2000, after Mark Hartvigsen testified that he had to escape from the Central Arizona Detention Center, run by Corrections Corporation of America, because his life was in danger, said his attorney Richard Gierloff.

Hartvigsen told jurors that he has a heart condition requiring medicine but that CCA guards would often withhold his medication for "disciplinary reasons." He also testified that CCA medical personnel gave him the wrong medication for a while, causing him to have a stroke.

Acquittals from escape charges are rare. The "duress defense" presented by Hartvigsen's attorney almost never succeeds. Under Arizona law, a prisoner has to convince the jury that he faced immediate life-threatening danger and that he had tried legal means to fix the problem.

The prosecutor in the case told the jury that Hartvigsen's allegations of medical mistreatment were not true, according to the Alaska Commissioner of Corrections Margaret Pugh. But the prosecutor made a "tactical decision" to not present evidence to the contrary, Pugh told the *Daily News*.

Hartvigsen's co-defendant, Edward L. Martin, was acquitted after offering an even rarer defense. In closing arguments, his attorney John Schaus pointed out to the jury that the prosecution failed to present any evidence that the defendant was the same "Inmate Martin" who escaped. Martin also had complaints about medical maltreatment, but he did not take the stand. "My argument to the jury was, you don't have to get to duress," Schaus told the *Daily News*. "They never established that he left."

Pugh said she and other state officials were astounded when they learned of the verdicts. She attributed them to the "unpredictable nature" of juries.

Source: *The Daily News*

# Iowa Supreme Court Holds Liberty Interest in Good Time Law

The Iowa supreme court held that Iowa prisoners have a due process liberty interest in their good time credits, but do not have a private cause of action under Iowa tort law for their negligent loss. Federal courts previously held that Iowa law did not create a liberty interest in prison good time credits.

Patrick Sanford, an Iowa state prisoner, was incarcerated on theft charges shortly before his scheduled release from prison. He was found guilty of the charges at a prison disciplinary hearing and sanctioned with 380 days in disciplinary segregation and the loss of 1,000 days of good time credits. After exhausting prison administrative remedies, Sanford filed suit in state court. The trial court upheld the infractions but ruled that the loss of 1,000 days of good time credits was excessive. It then remanded the case to the Iowa DOC for imposition of sanctions consistent with the ruling. The Iowa DOC then reduced Sanford's loss of good time credits to 465 days. The DOC did not appeal from that ruling.

Prior to the thefts, Sanford had a prison release date of May 28, 1994. With the trial court's reduction of the theft sanction, he should have been released from prison on February 6, 1995. However, that date had passed by the time the trial court ruled in his favor. Sanford was not actually released from prison until October 6, 1995.

Sanford then filed suit in state court seeking money damages for the time he spent in prison between February 6, 1995, when he should have been released, and October 6, 1995, when he was actually released. The trial court granted summary judgment to the prison official defendants by ruling that Sanford's claims were barred under *Heck v. Humphrey*, 114 S.Ct. 2364 (1994) and that Iowa code, section 903A.3(1)(1993) does not create a private cause of action for damages when good time credits are wrongly seized.

At the outset, the Iowa supreme court held that Sanford's claims were not mooted by his release from prison. Since the DOC did not appeal the original trial court ruling reducing the disciplinary sanction, they were barred from attacking that judgment in this action.

The court reaffirmed its prior precedent that Iowa prisoners have a due

process liberty interest in their good time credits. In *Moorman v. Thalacker*, 83 F.3d 970, 973 (8th Cir. 1996) the federal court of appeals for the Eighth circuit suggested that after *Sandin v. Connor*, 115 S.Ct. 2293 (1995) this was no longer the case. Analyzing Iowa's good time scheme for prisoners the Iowa supreme court concluded that Iowa code chapter 903A creates "an interest of real substance" for the reduction of prisoners' sentences based on their good conduct.

The court was critical of the analysis in *Moorman* and stated that it based its own analysis finding a liberty interest "on the nature of the inmate's interest, not the state's assessment of that interest .... When viewed from the inmate's perspective, his interest in not forfeiting good conduct time is substantial and significant regardless of the degree of misconduct that might result in forfeiture." "Accordingly, we hold that Sanford has a liberty interest in his good conduct time that is protected by the due process clause of the Fourteenth amendment."

The court held that Sanford's due process rights had been violated because, while he had obtained a reduction in sanctions in the trial court, it occurred too late to remedy the harm that had already occurred, i.e., he was held in prison past the date ordered by the court. This distinguished the case from several Eighth circuit cases cited by the defendants.

The court held that *Heck* does not bar Sanford's claim for damages. *Heck* bars collateral attacks on criminal judgments via 42 U.S.C. § 1983. "Sanford's damages claim does not rest on the invalidity of his underlying convictions, it rests on the invalidity of the sanctions imposed. Those sanctions have been invalidated. Thus, the claim made in this § 1983 action does not exceed the scope of Sanford's success in the post conviction relief actions." The court concluded that Sanford's claims against the individual defendants were not barred by *Heck*.

Turning to Sanford's tort claim against the state, the court held that under the Iowa Tort Claims Act, Iowa code, chapter 669, state prisoners do not have a private cause of action for the negligent loss of good time credits.

The court affirmed dismissal of Sanford's claims against the state but reversed and remanded the claims against

the prison official defendants back to the trial court for further proceedings. See: *Sanford v. Manternach*, 601 N.W.2d 360 (Iowa 1999). ■

## PLN On the Air

Every week PLN editor Paul Wright delivers prison news and commentary on radio station KPFA, 94.1 FM in San Francisco, CA. Titled *This Week Behind Bars* the show airs every Thursday or Friday between 5 and 6 PM as part of the *Flashpoints* program.

If your local radio stations aren't carrying any prison news or commentary ask them to carry *Flashpoints*. The show is available nation wide over a satellite feed. Straight out of the gulag. Radio stations interested in carrying the show should contact *Flashpoints* producer and host Dennis Bernstein at: (510) 848-6767.

## Inmate Classified

# Slave Labor O.K.

## FLSA Does Not Apply to Detainees

by Matthew T. Clarke

The Third Circuit court of appeals has held that detainees who won their criminal appeals, but the state appealed further, are still “duly convicted” detainees for purposes of the Thirteenth Amendment’s prohibition on slavery, even if the detainee ultimately prevails on appeal. The Third Circuit also held that the Fair Labor Standards Act (FLSA) does not apply to detainees or pretrial detainees so that they need not be paid minimum wage for the work they are forced to perform.

Mark D. Tourscher is a Pennsylvania state detainee who was forced to work in the prison’s cafeteria during the pendency of his appeal, after the appeal had been decided in his favor by the intermediate court of appeals and Pennsylvania appealed further and after the Pennsylvania Supreme Court refused to hear the state’s appeal. Alleging that this was slavery in violation of the Thirteenth Amendment to the United States Constitution, Tourscher filed suit against the prison officials under 42 U.S.C. § 1983.

The Thirteenth Amendment forbids slavery except as punishment for persons “duly convicted” of a crime. Tourscher alleged that he was not “duly convicted” while his case was pending on appeal, after the intermediate court of appeals reversed his case, but it was pending on the state’s discretionary appeal, and after the petition for discretionary appeal was denied. Tourscher also alleged that the FLSA applies to him and requires that the state pay him minimum wage for the work he was required to perform in prison. The magistrate judge recommended that the district court dismiss the complaint either for failure to state facts showing a federal constitutional violation or because the law regarding whether a pretrial detainee could be compelled to work was not so clearly established that the prison officials could reasonably know their conduct was unlawful and were thus entitled to qualified immunity. The district court adopted the magistrate’s recommenda-

tion without stating the basis of the adoption. Tourscher appealed.

Initially, the Third Circuit decided that there was no difference between a detainee who was finally convicted and a detainee whose conviction had been overturned by an intermediate court of appeals, whose decision was pending on review by a higher court. When the state filed their petition for discretionary appeal to the state supreme court, it stayed the decision of the intermediate court of appeals and the initial conviction remained in full force until the state supreme court denied discretionary appeal. Therefore, during that time period, Tourscher was still “duly convicted” for Thirteenth Amendment purposes. Under the Thirteenth Amendment, “duly convicted” detainees could be subjected to involuntary servitude. The obvious logic flaw in this line of reasoning is that, if the higher appeal stays the effect of the lower appeal, why didn’t the lower appeal stay the effect of the conviction?

After the state supreme court denied discretionary appeal, Tourscher unquestionably reverted to pretrial detainee status and the Thirteenth Amendment’s prohibition of slavery applied to him. Therefore, the court went on to determine whether Tourscher was entitled to FLSA minimum wage for the work he performed as a pretrial detainee.

Noting that all ten circuits which have addressed the issue have held that detainees producing goods and services used by the prison were not “employees” under the FLSA, the Third Circuit held likewise. The court noted that the Fifth Circuit had held that a pretrial detainee required to work for an outside construction company in competition with other private employers was an employee for FLSA purposes, but that was not the case here. Tourscher was not working outside the prison and his work was not similar to traditional free-market employment. Therefore, the court joined the Eleventh Circuit in holding that a pretrial detainee was not an “employee” under the FLSA and could be required to perform work

within the prison without minimum wage compensation.

The Third Circuit also held that it could not decide whether Tourscher’s constitutional right of freedom from involuntary servitude had been violated by his being required to work during the period he was a pretrial detainee because he did not state in his complaint how many hours and what type of work he was required to perform during that period. Therefore, the case was returned to the district court for service of the complaint on the defendants and determination of the nature and amount of work performed by Tourscher during the eleven days he was a pretrial detainee between his first and second convictions. See: *Tourscher v. McCullough*, 184 F.3d 236 (3d Cir. 1999). ■

Douglas Wade

## Mailbox Rule Applies to Section 2254/2255 Motions

The Tenth Circuit Court of Appeals held that a prisoner's pleadings were filed at the time he mailed them, even though he used the prison's regular mail system instead of its legal mail system.

While incarcerated at the Federal Correctional Institution in El Reno, Oklahoma, Steven Gray filed a motion to vacate, set aside or correct his sentence, pursuant to 28 U.S.C. § 2255.

Gray's motion was due on or before April 24, 1997 - one year from the effective date of the Antiterrorism and Effective Death Penalty Act, (AEDPA). He mailed the motion on April 21, 1997, but the court did not receive it until April 30, 1997.

Because Gray used the prison's regular mail system instead of its legal mail system, the district court rejected his argument that the motion was filed the day he mailed it. Accordingly, the court denied the motion as untimely.

The court of appeals concluded that Gray should not be barred from the benefit of the mailbox rule because El Reno's legal mail system does not provide a log or other record of receipt by prison authorities of all legal mail sent from the prison. Because Gray's motion was accompanied by a certificate of service, containing a declaration that he gave his motion to prison authorities on April 21, 1997, and there was no evidence to the contrary, the court concluded that it was timely. See: *U.S. v. Gray*, 182 F.3d 762 (10th Cir. 1999).

In a related case, the First Circuit Court of Appeals held that the prison mailbox rule applies to the filing of motions under 28 U.S.C. § 2255 and § 2254, provided that any available system of recording legal mail is utilized.

Augustin Morales-Rivera's § 2255 motion was due before April 24, 1997. He alleged that he placed it in the prison's internal mail system before the last day of filing but the court did not receive it until August 5, 1997.

The district court rejected Morales-Rivera's argument that the motion was timely filed under the prisoner mailbox rule and dismissed the motion as untimely. The court concluded as a matter of law that the prison mailbox rule applies only to pleadings with filing peri-

ods shorter than the AEDPA's one-year period.

The court of appeals vacated the district court judgment, holding that there was no practical or principled justification for refusing to apply the prisoner mailbox rule to § 2255 and § 2254 motions. See: *Morales-Rivera v. U.S.*, 184 F.3d 109 (1st Cir. 1999).

Finally, the Ninth Circuit Court of Appeals held that the AEDPA limitations

period was equitably tolled by a state prisoner's reliance on prison authorities to timely submit his § 2254 petition. The court also noted that the mailbox rule would appear to apply because the petition was delivered to prison authorities for mailing before the limitations period expired. See: *Miles v. Prunty*, 187 F.3d 1104 (9th Cir. 1999). ■

### Private Prison Contract May Be Invalid

The Colorado state court of appeals remanded a case to the trial court for a determination of the validity of a private prison contract. The court implied that the contract may be invalid but failed to indicate what, if any, remedy may exist if it is.

William Arnold, was transferred from a Colorado Department of Corrections (CDOC) facility to a privately operated prison in Dickens County, Texas. He was then moved to a private prison in Karnes County, Texas, and finally to a private prison in Colorado.

Arnold filed a motion in the trial court asserting numerous challenges to his transfer, but the court summarily denied the action, finding that Arnold had been transferred to Texas under the Interstate Corrections Compact, (ICC).

The court of appeals found that there was no evidence in the record to support the trial court's finding that Arnold was transferred pursuant to the ICC. The court also observed that the ICC relates to agreements between states, not to agreements between a state and a county of another state.

The court rejected Arnold's argument that the CDOC Executive Director lacked the authority under Colorado law to enter into contracts with counties of other states. The court also rejected Arnold's claim that neither Karnes nor Dickens counties had authority under Texas law to enter into contracts with the Executive Director for the confinement of prisoners convicted of Colorado offenses.

Arnold claimed that the contract with Karnes County was invalid for not containing the approval of the Controller of the State of Colorado, as required by the

express language of the contract. But the court of appeals was unable to review this claim because the trial court made no findings when it denied Arnold's challenge.

The case was remanded for a determination of whether a valid contract existed when Arnold was transferred. The court of appeals suggested that if the contract was invalid, the trial court should then consider the remedy, if any, that Arnold might be entitled to.

See: *Arnold v. Colorado Dept. of Corrections*, 978 P.2d 149 (Colo.App. 1999). ■

### Mag Wizard

# Retaliation Claim Remanded For Hearing On Qualified Immunity

By Ronald Young

COX

The court of appeals for the Second circuit held that a district court's denial of summary judgement to prison guards on grounds of qualified immunity required remand to reconsider whether action against prisoner would have taken place in the absence of any retaliatory motive. The court also held that pendent appellate jurisdiction did not exist over the prisoner's interlocutory cross-appeal on issues unrelated to those qualified immunity issues raised by the guards.

Ronald Davidson, a New York state prisoner, was bench-warranted to New York City pursuant to a writ of habeas corpus ad testificandum signed by a federal judge to testify at another lawsuit he had pending in federal court. During this time, Davidson spent five days at the Metropolitan Correctional Center (MCC), a federal jail run by the Bureau of Prisons (BOP). Davidson filed a *Bivens* suit and alleged that several BOP guards violated his First and Eighth Amendment rights by, among other things, denying him a kosher diet and the opportunity to exercise in retaliation for his filing a lawsuit against a former MCC employee. Davidson also claimed that the denial of a kosher diet violated the Religious Freedom Restoration Act (RFRA). The RFRA, though ruled by the U.S. Supreme Court to be unconstitutional when applied to the states, is still valid for claims against the federal government.

The district court granted defendants' motion for summary judgement as to all claims and all defendants, except for those claims asserted against prison guards Melvin L. Chestnut, Byron Goode, and Ecliffe Govia for retaliatory denial of a kosher diet; and a claim against prison guard Valerie Smith for retaliatory denial of the opportunity to exercise. The prison guards appealed.

On appeal the government argued that the district court, in evaluating whether summary judgement was warranted, erred by failing to consider whether the prison guards would have taken the same actions absent the alleged retaliatory motive. In a claim for retaliation for exercise of a constitutional right,

the plaintiff bears the burden of showing that the conduct at issue was constitutionally protected and that the protected conduct was a substantial or motivating factor in the prison officials' actions. See: *Graham v. Henderson*, 89 F.3d 75 (2nd Cir. 1996).

Once the plaintiff has satisfied that burden, the burden then shifts to the defendants to show that they would have taken the action even in the absence of the plaintiff's protected conduct. At the summary judgement stage, if the undisputed facts demonstrate that the challenged action clearly would have been taken on a valid basis alone, defendants should prevail.

The defendants argued that even if retaliation against Davidson was a motivating factor for denying him a kosher diet, there was a BOP policy in place that would have caused them to deny Davidson a kosher diet until his application to the chaplain for a special religious diet was approved. The appeals court felt that it was unclear as to whether or not the district court took this into consideration when it denied qualified immunity summary judgement to the defendants. It vacated the district court's denial of summary judgement to the defendants and remanded to the district court for reconsideration.

Likewise, the appeals court found that it was not clear whether the district court had considered the defendants' arguments that circumstances other than the retaliation factor were cause for Davidson being denied the opportunity to exercise. This, too, was vacated and remanded for reconsideration.

The appeals court also stated that it would not decide matters of evidence sufficiency on interlocutory appeal, even though all parties had urged it to do so. It also held that Davidson's cross-appeal did not overlap with any of the issues raised by the defendants' appeal and therefore pendent appellate jurisdiction was not available for the issues raised by Davidson. See: *Davidson v. Chestnut*, 193 F.3d 144 (2nd Cir. 1999). ■

paper wings

## Prison Riots in Peru

On Monday, February 7, 2000, prisoners from the Communist Party of Peru (PCP, or "Shining Path" in the media) led an uprising at the maximum-security prison of Yanamayo in Puno, taking over 30 hostages. Seven guards and police were wounded, and one prisoner was killed, identified as Carlos Celso Ponce Torres.

The next day army troops and police under the command of general José Villenas Arías took over operations. At least six efforts to retake the pavilion by force failed, and negotiations under tight secrecy were begun. It was reported that the PCP prisoners were demanding the presentation of Abimael Guzmán (AKA Chairman Gonzalo), the imprisoned leader of the PCP, because they fear he has been killed by the regime. For some time supporters of the PCP have been raising the demand that Chairman Gonzalo be allowed to appear live on television. The prisoners hung banners and a red flag from the windows, shouting slogans until at least 8:00 PM on Monday.

The hostages were released around midday on Monday, but the prisoners continued their agitation and demanded the presence of Red Cross members to avert a massacre by the army troops surrounding the pavilion. According to unofficial sources, the communist prisoners had signed an agreement with two generals Andrés Bernardo Pineda and Gustavo Bravo Vargas, and Nancy Arias (head of INPE, the National Prison Institution), in order to release the hostages in exchange for preventing the troops from violently storming the pavilion to crush the uprising.

Peru's President, Alberto Fujimori, stated that the prisoners' had been demanding talks with Abimael Guzmán, to be classified as prisoners of war, and the closing down of the maximum security prison at the naval base in Callao. He denied that any negotiations had occurred. However, this was contradicted by the an INPE report written on February 8 which revealed that the riot was not crushed but ended after an agreement was reached by both parties. The PCP prisoners had been

demanding an end to the isolation of Abimael Guzmán and his public presentation; that they be recognized as "political prisoners" and not "terrorist delinquents"; the closing down of the prisons at the naval bases of Callao and Challapallca, in Puno, along with the repeal of Supreme Decree #005-97-JUS, which imposes severe prison conditions for all those convicted of terrorism and "treason to the fatherland".

The prison uprising had been foreshadowed by earlier riots on January 21 when prisoners' relatives were not allowed to visit after reaching the remote prison. Since that time visits had been suspended, and the uprising followed a surprise inspection on Sunday, Feb. 6 by a group of police after they tried to enter the pavilion occupied by the PCP prisoners. After meeting resistance from the PCP prisoners armed with homemade weapons, many of them fled, among them 27 who took refuge in the pavilion occupied by MRTA prisoners.

According to MRTA Tupac Amaru Revolutionary Movement prisoners, the riot began after around 60-70 anti-riot police, armed with shotguns and tear gas, began their inspection and a fight broke out. PCP prisoner Carlos Ponce Torres was shot in the face and Alberto Ramirez was wounded. At that point hostages were taken and some of the police took refuge in the MRTA's pavilion, who did not support the uprising. Conditions in Peru's prisons are known to be particularly harsh; Yanamayo is located at 3,870 meters above sea level, and it is very difficult for prisoners' relatives to visit. In June 1986, the Peruvian government massacred some 300 prisoners in the prisons of El Fronton, Lurigancho and Callao during a prison revolt by the communist prisoners.

Similarly in May 1992, over 100 prisoners at Canto Grande prison were massacred after a prison uprising was put down. ■

Sources: *La Republica* 2/8/2000, 2/9/2000, 2/10/2000, *Sol Rojo*

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## IN Jail Settles Victim Suit for 1650,000

On September 10, 1999, the Howard County jail in Indiana settled a lawsuit by crime victims for \$650,000. A mother, 44, and her 9 year old daughter were physically and sexually assaulted by a prisoner who escaped from the jail by using a maintenance key to access a utility shaft.

The plaintiffs sued the board of commissioners and jail defendants for negligently allowing the prisoner's escape, thereby creating a foreseeable risk of harm and danger to people outside the jail. The plaintiffs also claimed the defendants failed to take adequate security precautions because another prisoner had gained access to the same utility shaft three years before this incident. The plaintiffs claimed defendants failed to supervise the escapee, properly maintain the jail and hire, train and supervise qualified security staff.

The defendants denied any wrongdoing or liability and paid the plaintiffs \$650,000 to settle the lawsuit. See: Doe v.

US DC, SD IN, Case No.  
IP98-0073-CH 43 ATLA 57 (2000).■

Source: ATLA Law Reporter

Inmates Aid

## The Irish People

Want to know what's going on in Ireland? *The Irish People* reports the activities of groups and organizations that struggle together to end the British occupation of Northern Ireland. *The Irish People* also reports on American politics and events which directly affect the situation in Ireland. This paper has excellent reporting on Irish Republican political prisoners, ex prisoners, their activities and the ongoing struggle for the release of all political prisoners in Ireland and. This weekly tabloid is the best source of news on these issues. Subscriptions are only \$30 for 52 Issues. Contact: The Irish People 363 Seventh Ave. New York, NY 10001 (212) 736-0107 website: <http://inac.org/>

North Coast Express plug (to typeset)

## \$12,000 Awarded in NY Slip and Fall

On July 15, 1999, the New York court of claims awarded pro se New York state prisoner Hamilton Thompson \$112,000 for past pain and suffering. In 1996, while imprisoned at the Oneida Correctional Facility, Thompson slipped and fell in a puddle of water in his cell.

Prior to falling in the water Thompson had noticed the cell roof was leaking when it rained and prison officials were aware of the leak but did not fix it. The court held that Thompson had established a prima facie case of negligence by prison officials, which was not rebutted at trial.

Thompson suffered a broken nose in the fall as well as minor facial cuts. The court awarded \$112,000 in damages. See: *Thompson v. State of New York*, Claim Number 94295, Court of Claims, Saratoga Springs.■

Source: *New York Jury Verdict Reporter*

## The Western Prison Project

The Western Prison Project exists to help build a movement for progressive prison and criminal justice reform in our region (OR, WA, ID, MT, WY, UT, NV). We help support grassroots organizations working on prison issues (through research, coordination of joint projects, and technical assistance), and reach out to the public with information about the prison crisis in our region, to mobilize citizen action for reform. We publish "Justice Matters", a quarterly newsletter for members (\$7 membership for prisoners, \$15 others). Contact:

**The Western Prison Project**  
P.O. Box 40085, Portland, OR 97240  
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# Marriott Cancels Prison Protest Concert

Sodexo-Marriott is a huge transnational corporation mainly consisting of hotel and food service operations. Marriott Dining Services, a subsidiary of Sodexo-Marriott, operates the American University Tavern on the Washington D.C. campus of AU.

On February 15, 2000, a hip-hop concert was booked at the Tavern by AU Students for Sensible Drug Policy (SSDP). The show, "No More Prisons," was scheduled to coincide with many other events held around the country to protest the U.S. prison and jail population reaching two million, which had been estimated to occur on or about that date.

But a few minutes before the show was supposed to begin, AU SSDP vice president Dave Epstein announced from the stage that the management staff of the Tavern would not allow the show to happen.

Earlier that day AU and George Washington University's chapters of SSDP held an anti-drug war vigil in front of the U.S. Capitol. At the Tavern, several representatives from both AU's and GW's SSDP, as well as the Drug Reform Coordination Network, were distributing pamphlets outlining the increased cost of imprisonment and the decrease in spending on education.

"We had a hip-hop show planned," Epstein told a packed house from the stage of the Tavern, "But Marriott Dining Services, a company that invests highly in private prisons, has determined that the show is not going to happen."

Epstein was referring to Sodexo's 11 percent shareholding in the Corrections Corporation of America, the world's largest private imprisonment firm. He said the cancellation "smacks of conspiracy."

Sodexo-Marriott representatives said there was no bias against the concert's anti-prison theme that influenced their decision to stop the show. Rather, the paperwork necessary to hold the concert had not been filed on time.

The concert was quickly relocated to SSDP President Kate Sander's house;

cars and volunteer drivers were rounded up to transport the audience and the artists and the show went on.

Was this a simple paperwork snafu, as Marriott officials claimed, or a blatant example of corporate repression of political speech?

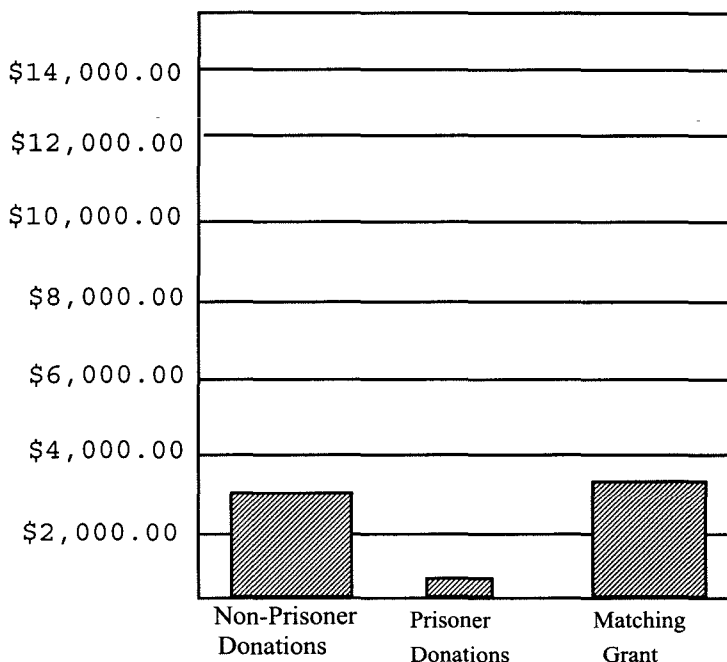
"Obviously SSDP has no knowledge of any conspiracy by Sodexo-Marriott against us," GW SSDP president Kristy Gomes said. "In order to uncover a conspiracy would take years of legal fighting... but it raises a lot of questions." ■

Source: *The Eagle American U-Wire*

## Contribute to PLN's Matching Grant Campaign

A PLN supporter will provide a matching grant for all individual donations made to PLN between March 1, 2000 and January 15, 2001, up to and including \$15,000. The matching grant does not apply to money sent to PLN to pay for subscriptions, buy books or to grants from foundations. It applies only to individual donations. Donations by non prisoners will be matched dollar for dollar up to \$500. Donations by prisoners will be matched at the rate of two dollars for every dollar given. All donations are tax deductible. New, unused stamps and embossed envelopes are fine. If you haven't donated to PLN's Matching Grant Campaign yet, please do so now. No amount is too small and every little bit helps. We will announce the amount raised in our February, 2001 issue unless we meet the \$15,000 goal before then.

## Matching Grant--July, 2000



## News in Brief

**CO:** On April 26, 2000, Bobby Fowler, 24, a captain at the Kit Carson Correctional Center in Burlington, was arrested and charged with felony criminal mischief for punching walls and knocking over a metal detector at the prison. The prison, operated by for profit Corrections Corporation of America, is chronically understaffed. Fowler was reprimanded when a surprise inspection by the Colorado Dept. of Corrections found nine guards, instead of 11, guarding 400 prisoners. Fowler claimed his outburst was the result of working 15 days in a row, which caused him to miss taking the medication he uses to control his bipolar disorder.

**CA:** On April 27, 2000, an unknown person fired a large caliber weapon into the Santa Clara probation department's work release facility in Mountain View. An unidentified 20 year old male prisoner was killed by the gunshot and an unidentified female counselor was cut by flying glass from the shot. The prisoner was serving a sentence for a non violent offense and was due to be released within a week of his death. Police are investigating the shooting.

**CA:** On April 6, 2000, Viola Cisneros, a medical worker at the California Medical Facility in Vacaville was taken hostage in the prison print shop by John Cantazarite, 50. Cantazarite had threatened to set Cisneros on fire if he was not allowed to place three phone calls outside the prison. Two hours later a Special Emergency Response Team broke down the print shop door and subdued Cantazarite. No injuries were reported. Cantazarite is serving time for rape and robbery.

**CA:** On March 1, 2000, six prisoners were injured in a fight between black and Hispanic prisoners at the Victor Valley Community Correctional Facility. The minimum security prison is operated by Marantha Private Corrections, a private, for profit prison company, on behalf of the California Department of Corrections. Ten to fifteen prisoners were involved in the brawl.

**CA:** On March 2, 2000, Kedrin Kizzee, 26, escaped from the West Valley Detention Center in Rancho Cucamonga by impersonating another prisoner scheduled for release. Kizzee was awaiting trial

on charges of possessing marijuana, 20 kilos of cocaine, hundreds of false credit cards and machines with which to make them. Police said this was the third escape from the jail involving switched identities. Kizzee was caught two days later in Buena Park. Police later arrested Lya Manuela Bernard, 33, a jail custody specialist, and charged her with allowing Kizzee to be released from the jail.

**CA:** On March 25, 2000, Nevada prisoners James Prestridge, 39, and John Doran, 26, escaped in Chula Vista while being transported to other state prisons by private, for profit, transport company Extraditions International. The men escaped by overpowering and disarming one guard while they used the bathroom, then returning to the van and disarming the other guard. The men then put the guards into the back of the van with the other prisoners and drove around before abandoning it. Prestridge, serving a sentence of life without parole for murder, was being transferred to a North Dakota prison. Doran, serving a six year robbery sentence, was being extradited to face additional criminal charges in Colorado. Extraditions International planned to pick up additional prisoners in San Diego before returning East.

**Colombia:** On April 28, 2000, rioting by right-wing paramilitary prisoners at the E1 Modelo federal prison in Bogota left 26 dead. The rioting started on April 26 when guards found the body of a missing paramilitary prisoner chopped up in a garbage bag in a sewer pipe. In retaliation for the murder, paramilitary prisoners attacked the cell block housing the presumed attackers, mainly social prisoners convicted of murder and robbery. Using guns and grenades the paramilitary prisoners killed 26 and wounded 18 social prisoners before negotiating with police to return to their cells.

**Colombia:** On March 1, 2000, James Springette, 39, an American awaiting extradition to the United States on drug smuggling and murder charges, escaped from la Picota prison in Bogota. Springette requested a new mattress, wrapped himself in the old one and was carried past seven checkpoints out of the prison. Fifteen prison guards were suspended after his escape, which purportedly could not have happened without guard collusion.

Springette is described by police as an expert in mapping drug smuggling routes in the Caribbean. Apparently he can map escape routes as well.

**DC:** On April 17, 2000, Hilton Coleman, 48, a U.S. Marshal supervisor, pleaded guilty to stealing \$6,500 intended for people in the Witness Protection Program. Coleman would forge the witnesses signature on voucher receipts and give them less money than he was supposed to, pocketing the difference.

**IL:** In 1999 the Illinois DOC collected \$57,818 from Illinois prisoners under a statute authorizing the collection of money from prisoners to pay for the cost of their captivity. The money collected was from prisoners working for prison industries. In 1999 Illinois spent \$856 million on its prison system.

**IL:** In March, 2000, James P. Struensee, 30, was sentenced to 16 months in federal prison and 3 years of supervised release after pleading guilty to federal charges of possessing child pornography. At the time of his arrest, Struensee was an internal affairs investigator at the Stateville Correctional Center in Joliet.

**Mexico:** On April 26, 2000, hundreds of prisoners at the La Loma jail in Nuevo Laredo rioted to protest plans to replace the jail's director, Jose Luis Pompa Guerrero. The rioters demanded that Pompa remain at the jail.

**NY:** On March 29, 2000, Timothy Weeden, 27, was sentenced to six years in prison after pleading guilty to forcing a 15 year old girl to perform oral sex on him during the Woodstock concert. Weeden was employed as a guard at the Marcy Correctional Facility at the time of the attack.

**OH:** On April 4, 2000, Jeffrey Corbett, 52, was sentenced to 4 years in prison after being convicted in Williams County Common Pleas Court of sexually assaulting three female prisoners at the Corrections Center of Northwest Ohio. Corbett was a supervisor at the jail. According to the victims, Corbett forced them to perform sexual acts while purporting to "counsel" them on disciplinary charges. Corbett was convicted of four counts of sexual battery stemming from the attacks.

**OH:** On March 27, 2000, Roy Williams, 40, was charged with stealing lighting fixtures and painting equipment while ostensibly supervising prisoners working on a Habitat for Humanity housing project. Williams is a prison guard at the Grafton Correctional Institution. He is charged in state court with receiving stolen property and theft in office. Habitat for Humanity is a non profit group that builds homes for poor people.

**OH:** On March 31, 2000, Cleveland House of Corrections guards Steven Dlugon, Samuel Young and Terrell Pruitt severely beat jail prisoner Robert Wade, 30. The jail investigated the attack and on May 2, 2000, fired Young and Dlugon. The local prosecutor has recommended that police arrest the three guards on felony charges.

**PA:** On April 13, 2000, Hasn Dempsey, 20, was charged with manslaughter in the death of Carl Harden, 50, while both men were prisoners in the Philadelphia House of Corrections. Dempsey had told Harden not to stand behind him while they were watching television, Harden did not move. The men then scuffled and Dempsey lifted Harden upside down and drove his head into the concrete floor in the jail dayroom. Harden later died of head injuries.

**NY:** Responding to complaints by Jail Ministries, the State Commission on correction has ordered the Onondaga County Justice Center to provide jail prisoners with more underwear. The group claimed jail prisoners were forced to wear the same underwear for days on end due to shortages. Jail officials agreed to spend \$38,000 from money they receive as kickbacks from the prisoner's phone calls to buy the additional underwear.

**TX:** On April 7, 2000, a Tyler jury sentenced Kenneth payee, 29, to 16 years in prison for stealing a Snickers bar from a local grocery store. Defending the sentence, Smith county assistant district attorney Jodi Brown told media "It [the Snickers bar] was a king size." The theft was charged as a felony because Payne has prior criminal convictions, including one for stealing a bag of Oreo cookies.

**VA:** On April 17, 2000, Calvin Clarke, 30, a Hanover County Jail prisoner, freed himself from his handcuffs and took a 45 caliber pistol from an unidentified jail guard. Clarke then took the guard hos-

tage, forced him to drive away from the jail and later held police at bay for 32 hours before surrendering. No one was injured during the incident. Clarke was being taken to court for sentencing when he freed himself. He faces additional charges stemming from the escape attempt.

**Vietnam:** To celebrate the 25th anniversary of liberating South Vietnam and unifying their nation, the government announced on April 30, 2000, that it would free 12,000 prisoners.

**WA:** In April, 2000, King county (Seattle) jail guard Alvin Walker, 49, was charged with bigamy.

**WA:** In April, 2000, Ryan Wade Mackey, 24, was sentenced to 12 months of community supervision after pleading guilty to disorderly conduct and obstructing a law enforcement officer. Mackey, a white guard at the Clallam Bay Corrections Center (CBCC) in Clallam Bay, was originally charged with felony malicious harassment after confronting three blacks and an Indian in a Port Angeles restaurant. According to police, Mackey cursed and pushed them "asking what they were doing there and stating that their kind did not belong there, so they should leave." As previously reported in the May, 1999, issue of *PLN*, CBCC has a long history of racist prison employees.

**WA:** On March 28, 2000, officials at the Snohomish County Jail in Everett announced they would no longer force women prisoners to strip naked in an outdoor recreation area, in full view of male guards, in order to exchange clothing and linen. The prisoners were required to remove their clothes outdoors in freezing temperatures and in view of male guards to get clean clothing. Jail spokesman George Hughes said the outdoor stripping program was devised to allegedly stop prisoners from flushing clothes down toilets. "That was a solution that was developed by a few of our staff, and it worked. Our staff is constantly trying to find ways to improve things."

**WA:** On May 8, 2000, James Harris, Jr. 42, was charged in King County (Seattle) superior court with abuse of power, assault and custodial sexual misconduct. Harris, a former Renton City Jail guard, is charged with raping at least 1 female prisoner at the jail in 1998 as well as having

sexual contact with other female prisoners.

**WI:** On April 26, 2000, police arrested Sandra Peterson, 50, and charged her with smuggling marijuana into the Jackson Correctional Institute in Black River Falls on 8 occasions. Peterson teaches basic math, science and reading to prisoners at the facility. Peterson was investigated, after informants identified her as smuggling drugs into the prison.

## **\$47,500 Settlement in Pennsylvania Restraint Suit**

In May, 1999, the Northampton County Prison (NCP) paid Maria Merced \$47,500 to settle a "hogtying" lawsuit she had filed. In August, 1996, while awaiting trial in the NCP, Merced argued with a guard and eventually spat on him. A number of guards then rushed into her cell, handcuffed her hands behind her back, placed shackles around her ankles and then chained the handcuffs to the shackles and left her like that for about eight hours.

On October 7, 1996, Merced was hogtied in this manner for four hours. On October 9, 1996, she was hogtied for 91/2 hours, this time while she was naked. She was also denied food during this period. A community investigation was conducted of the incidents and eventually one of the guards involved in the incidents was fired and several others were suspended. Merced suffered lower back and neck strain, contusions on her thighs and lacerations and swelling on her wrists as a result of the hogtyings.

Merced filed suit claiming the hogtyings violated her Eighth amendment rights against cruel and unusual punishment. The Northampton County Prison settled the lawsuit by paying Merced \$47,500 in damages and changing its policies to ensure restraints are used only for medical and mental health purposes and not for disciplinary reasons. Merced was represented by the Pennsylvania Institutional Law Project. See: *Merced v. Northampton County Correctional Facility*, USDC ED PA, Case No. 98-4215. ■

## \$100,000 Awarded Under ICCPR in GA Jail Suit

On February 24, 2000, a federal jury in Augusta, Georgia awarded \$1100,000 in damages to a Danish citizen who was denied medical care and phone calls to his family in Denmark while he was awaiting trial in the Lincoln County Jail in Georgia. The ruling is historic because it is the first time and American jury has awarded damages under the International Covenant on Civil and Political Rights (ICCPR), a treaty to which the United States is a signatory.

Flemming Ralk, 72, was held for 14 months in the Lincoln county jail in Lincolnton, Georgia, awaiting trial on federal fraud charges. Ralk went to trial and was acquitted on all charges. While awaiting trial Ralk repeatedly sought medical treatment for a herniated disk and stomach trouble. He did not receive adequate medical treatment. He was also denied reading material and outdoor exercise. The jail's phone sys-

tem only allows for collect calls within the United States. Ralk was not allowed to make any phone calls to his family in Denmark nor receive any calls from them.

Ralk filed suit under the ICCPR and 42 U.S.C. § 1983. The district court held that rights under the ICCPR are no greater than those under the U.S. constitution. In a published ruling involving the granting of summary judgment to the jail's doctor, the court held that there was no private cause of action for litigants under the ICCPR. However, news reports state that Ralk's ICCPR claims did in fact go to the jury on his claims against the remaining defendants. After a three day trial a jury held that Ralk's rights under both the ICCPR and the U.S. Constitution had been violated by Lincoln county, sheriff Edwin Bentley and chief jailer Mary Booker. The jury awarded Ralk \$100,000 in damages.

Tyge Trier, Ralk's Danish attorney who handled the ICCPR claim, said the jury understood that Ralk was presumed innocent while in the jail yet he was not treated as such. Joseph Wargo, the Atlanta lawyer who also represented Ralk, said he believed a \$100,000 award by a South Georgia jury indicated how serious violations were at the Lincoln county jail. Wargo said the ruling was an important precedent because juries in this country have rarely been allowed to consider ICCPR claims. In addition, it should alert jail officials to special concerns by foreign citizens imprisoned in their jails. Ralk said the damages did not fully compensate him for money he lost from his businesses while he was imprisoned by "I think I got satisfaction, definitely." See: *Ralk v. Lincoln County*, Georgia, 81 F. Supp.2d 1372 (SD GA 2000).

Primary source: *Associated Press*

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### **The Politics of Heroin: CIA Complicity in the Global Drug Trade**

**By Alfred W. McCoy**

Lawrence Hill Books, 1991, 634pgs.

#### **Review by Rick D. Card**

Imagine America, the great crusader against illicit drugs, a nation willing to sacrifice hundreds of thousands of its citizens in the name of its War on Drugs. Now imagine that same sovereign secretly allied with known drug producers and traffickers and actively engaged in the control and transportation of those same drugs. This is the contrast unveiled in Alfred McCoy's book, *The Politics of Heroin*.

Heroin has a history that dates further back than the 5th century BC. In the *Odyssey*, Homer describes it as medicine to "lull all pain and anger, and bring forgetfulness of every sorrow." Today it is known as an illegal substance that brings hard core addiction or a fifteen year prison stretch.

How heroin went from the source of everlasting joy described by Homer to a potion of destruction in communities today has a lot to do with American and British activities. A subject McCoy has feverishly researched and documented. He charts the path of heroin as American and British merchants commercialized it and created a world opium trade. Trading it to the Chinese for tea, silk, and porcelain, the two great Western democracies laid a foundation for heroin trading that remains to this day.

*The Politics of Heroin* begins with a historical look at opium and describes how pharmaceutical companies such as Merck and Bayer transformed it into heroin, then aggressively marketed it domestically in the United States. By touting it as a substitute for morphine, doctors and pharmaceutical companies pushed the addictive narcotic onto an unsuspecting nation.

The early 1900s marked the beginning of a transition from legal to illegal

consumption of narcotics, and with it arose a black market where once stood a free market. It is here, says McCoy, that the real politics of heroin took shape.

World wars and a rising and then crashing stock market kept most of the leaders busy during the first fifty years of the 20th century. However, as World War II closed and the Cold War began, McCoy says that America entered the unseemly world of illegal drugs.

McCoy writes, "Needing new weapons to fight a new kind of war, the Truman Administration created the Central Intelligence Agency (CIA) in 1947 with two main missions--espionage and covert action. In effect, the CIA became the vanguard of America's global anti-Communist campaign. Practicing a radical pragmatism, its agents made alliances with any local group, drug merchants included, capable of countering Communist influence."

Within years of its creation, the CIA began to recognize the financial, logistical, and political power of heroin production overseas. Perhaps, McCoy suggests, the CIA recognized a "natural affinity between covert operations and criminal syndicates," which may have lured them to form alliances. In the words of one retired CIA agent, both covert operations and criminal syndicates practice "Clandestine art"--the basic skill of operating outside the normal channels of civil society."

The first clue to seeing the connection between the CIA and heroin involvement arose during the 1950's when federal agencies appeared to restrict domestic and international illicit drug trafficking, but conspicuously avoided Southeast Asia, the heartland of heroin production, and a center of CIA involvement. As it turned out, this was no coincidence.

*The Politics of Heroin* presents three distinct levels of American entanglement in drug trafficking. The first was what McCoy calls coincidental complicity, which is to say that the U.S., through the CIA, allied itself with groups who were active participants in the illegal drug trade. The second level was the CIA's active support of the traffickers evidenced by

its efforts to cover-up for known heroin dealers thereby condoning their activities. Finally, McCoy cites the active participation by American diplomats and CIA operatives in the transportation of opium and heroin as the third level of U.S. complicity in the international drug trade.

Throughout the book, McCoy takes us step-by-step through the labyrinth of international drug syndicates as they emerged, evolved, and eventually came to dominate the global market place. Behind every corner, he finds and documents evidence of CIA and American diplomatic involvement. The research is exhausting, and the proof undeniable.

Into the 1980s, while eclipsed by the media's attention on cocaine and crack, global heroin production and U.S. consumption rose steadily--a direct effect of the CIA's complicity in the opium fields of Southeast Asia. McCoy points out that world opium production tripled from an estimated 1,600 tons in 1982 to a whopping 4,600 tons in 1990. This production is traced to two key aspects of U.S. policy: the failure of the DEA's interdiction efforts and the CIA's covert operations.

*The Politics of Heroin* is a real blow to the legitimacy of America's War on Drugs. It shows indisputably that while the United States has set upon a course of incarcerating its citizens for mere possession of the smallest amounts of illegal drugs, it has itself been embroiled to the largest possible extent in the production and transportation of heroin.

The level of hypocrisy unveiled by this book is enough to rattle one's mind. A government who's left hand destroys what its right produces--namely, citizens who sell, possess, or use illegal drugs. But then crimes of this magnitude are all too common in the greatest democracy in the world.

*[This book is available through PLN , 2400 NW 80th #48, Seattle, WA 98117, for \$24.95 plus \$3.20 for priority shipping.]*

# Legal News

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## Wackenhut Wracked By Sexual Abuse Scandals

*by Ron Young*

After a decade as a leading operator of corporate-owned prisons, Wackenhut Corrections has become a prisoner of its own problems.

In New Mexico, a 500-page legislative report written by five consultants calls for a near-total overhaul of state prison operations, including two run by Wackenhut. After an August 31, 1999, riot that left a prisoner and guard dead [see PLN Dec. 1999], Wackenhut was faulted for having inadequate and ill-prepared staff earning Wal-Mart wages. Four prisoners have died in

Wackenhut prisons in Santa Rosa and Hobbs since their opening in 1998. Three were stabbed to death, and one fatally pummeled with a laundry bag containing two rocks. But it was the murder of guard Ralph Garcia last August 31 at the Santa Rosa prison that put Wackenhut on the hot seat.

In Fort Lauderdale, Fla., five guards at a Wackenhut work-release facility were fired or punished for having sex with prisoners in the summer of 1999. No charges were filed, but Sheriff Ken Jenne wants to renegotiate contract terms with Wackenhut. Wackenhut operates two medium-security prisons in Florida—one in South Bay and one in Moore Haven. In June 1999, the American Civil Liberties Union sued the company to turn over records to support allegations of sexual harassment and prisoner abuse in South Bay, but the case was settled confidentially.

On April 5, 2000, Wackenhut agreed to surrender control of its 15-month-old juvenile prison in Jena, Louisiana. That came a week after the U.S. Justice Department named Wackenhut in a lawsuit seeking to protect imprisoned boys from harm at the hands of guards and fellow prisoners. On March 30, 2000, the Justice Department added Wackenhut to its own civil rights lawsuit against Louisiana's juvenile prisons. The government asked a federal judge in Baton Rouge to enjoin Wackenhut from using harsh behavior-control methods at the Jena Juvenile Justice Center. The government

accused Wackenhut of beating boys, throwing tear gas indoors, spraying them in the face with pepper spray, and not providing them with adequate education and counseling. [See pg. 8]

But the biggest of Wackenhut's scandals has occurred in Texas where Wackenhut was stripped of a \$12 million-a-year contract in September 1999, and fined \$625,000 for failing to live up to promises in the running of a state jail. Twelve former guards were indicted for having sex with female prisoners. Civil lawsuits were brought by women who claimed they had been raped in three Wackenhut prisons in Texas. Allegations of poorly staffed prisons and rampant sex behind bars have Wackenhut on the defensive.

Wackenhut runs 11 facilities in Texas ranging from prisons to residential drug treatment centers. It used to have 12. Then, in August 1999, Wackenhut was booted out of a state jail in East Austin, Texas. Eleven former guards and a manager were indicted in December 1999, on charges of sexually assaulting or harassing 16 female prisoners at the 1,033-bed Travis County Community Justice Center in 1998 and 1999. In Texas, having sex with prisoners is a felony whether the prisoner consents or not. Texas officials called the Travis County case the biggest prison sex scandal in state history.

The Travis County state jail opened in 1997 as a community-based rehabilitation center to offer counseling, education and job training to nonviolent criminals.

## Inside

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From the Editor	5
ADA Jail Settlement	6
Wackenhut Sued by DOJ	8
Prison Protestors Arrested	10
WA Ends Telemarketing	11
Destruction of Property	13
America Behind Bars	14
Marilyn Buck	16
Political Prisoners in Spain	18
CA Tolling Statute	20
NY Ad. Seg.	22
CA 3 Strikers Good Time	23
News in Brief	26

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## **Wackenhut (continued)**

But in 1998, a state audit showed that the jail barely employed the minimum number of guards required by contract. At the time of the audit, Wackenhut started its guards at \$6.50 an hour, a puny wage in Austin's robust economy. Wackenhut raised salaries, but openings remained plentiful.

One former female prisoner, in an interview with *The Austin American-Statesman*, said sex was routinely traded for such things as shampoo and underwear. She said she was doped up on psychiatric medication late one night when a guard entered her cell and raped her. Over the next three months, she said, guards hit her to keep her from reporting the crime. Only after she appeared in court heavily bruised and emaciated did an investigation begin. In the meantime, she tried to kill herself twice. The guard she accused of rape is one of those under indictment.

"Some of these were outright rapes," said Ron Weddington, an Austin lawyer who represents another one of the rape victims in a civil suit against a former Wackenhut guard and Wackenhut itself. "I've been practicing law for about 30 years, and I've never heard of anything like this in the state- or county-run jails. This is pretty much off the charts."

The criminal case could grow bigger. In addition to the possibility of sex charges being brought against 20 more guards, the district attorney is looking into whether Wackenhut impeded the investigation by shredding documents at the lockup.

In Lockhart, Texas, where Wackenhut runs a women's prison, a grand jury looked into allegations of sexual misconduct by guards, and document tampering. No indictments were issued, but one former prisoner brought a private case against a former guard and Wackenhut in civil court. She accused the ex-guard, a lieutenant, of repeatedly raping her for four months in 1996. She accused Wackenhut of ignoring her pleas for help. The case was settled under confidential terms.

The allegations from East Austin and Lockhart seem to pale in comparison with the lurid accounts coming out of a girls prison run by Wackenhut in Bronte, Texas. The Coke County Juvenile Justice Center opened in 1994 with 200 beds. It

was to be a place where troubled girls as young as 12 years old would benefit from a number of innovative programs of education, rehabilitation and care. Wackenhut receives \$80 per prisoner per day to run the Coke County prison—its highest daily rate. But according to a 1999 lawsuit filed by Dallas lawyer Penny Raney, girls were forced to live in subhuman conditions.

"The girls were made to live in an environment in which offensive sexual contact, deviant sexual intercourse and statutory rape were frequent. This resulted in a hostile, permissive sexual environment, and where young prisoners were physically injured to the point of being hospitalized with broken bones," the suit states. The state filed criminal charges of sexual misconduct against two guards. Both pled guilty. Raney, in her lawsuit, accuses Wackenhut of failing to properly screen, train and supervise its employees. A previous suit Raney filed against Wackenhut over the prison was settled. The former prisoner she represented killed herself the day the settlement was signed.

During a personal interview, Wackenhut CEO George Zoley became visibly angry when asked about Coke County. He declined to discuss it because, he said, the case is in litigation. He said, however, the company reiterated its "zero tolerance" policy on employee misbehavior and its willingness to cooperate with investigators. Additionally, Zoley said he has hired a female consultant to review prison policies and procedures. One alteration supposedly already made is that only female guards will supervise female prisoners. "I think we have adopted all of the progressive policies to impede and stop these kinds of incidents," Zoley said. He also said the company has taken a number of steps to regain its footing in the prison and financial markets. "We obviously have to make sure we're doing what we're suppose to be doing ... and in conformance with American correctional standards," he said.

Analysts who follow Wackenhut Correction's shares on Wall Street still consider the company investment-worthy in spite of its problems. The stock was rated a "buy" or "strong buy" in each of the six ratings issued in the past year.

Wackenhut said in a March 30, 2000, filing with the Securities and Ex-

## Wackenhut (cont'd)

change Commission that negative verdicts in its civil cases could have a "material adverse effect" on its financial condition, which in turn could impair its ability to raise money. At that time the stock had already plummeted by 26.5 percent of its value. In addition to that, Wackenhut does not provide employee pensions, instead offering stock options which could be on the verge of becoming worthless.

Wackenhut ended 1999 with \$439 million in revenue and \$22 million in profits, both record amounts. It's conceivable that pending litigation against the company could wipe out all profits.

In the meantime, Wackenhut Corrections still faces a class action lawsuit in New Mexico over inadequate medical care for the mentally ill, conditions of confinement, and rip-off phone call rates. ■

Source: *Miami Herald*

## \$7,500 Award in NY Window Injury

On November 8, 1999, the New York court of claims awarded \$15,000 in damages to a New York state prisoner who cut his arm while opening a malfunctioning window. In 1990, Neil Henry, a prisoner at the Fishkill Correctional Facility in New York, cut his arm while opening a louvered window. Henry lost 25% of his blood volume and suffered artery and nerve damage as a result of the injury. Henry was later deported from the United States.

The court of claims awarded Henry \$5,000 for past pain and suffering, \$5,000 for a permanent scar and \$5,000 for past limitations on the use of two fingers. The damage award totaled \$15,000 but the court reduced the award to \$7,500, finding Henry's negligence contributed to his injury. Henry did not seek damages for lost earnings or incapacity. See: *Henry v. State of New York*, Claim No. 81358. Court of Claims, NV, White Plains. ■

Source: *NY Jury Verdict Reporter*

## Rockwall, TX Jailers Indicted In Sex-For-Contraband Case

Three Rockwall County, Texas jailers were indicted and all plead guilty after allegations that jailers gave drugs and alcohol to female prisoners in exchange for sex. A jail captain also resigned in lieu of prosecution.

One female prisoner was indicted for introducing alcohol into the jail in connection with a jailhouse sex-for-contraband trade that apparently has been allowed to flourish as long as two years. She pled guilty and received a 6-year prison sentence.

Sheriff Jacques Kiere is not under investigation, said Rockwall County Criminal District Attorney Ray Sumrow.

Sheriff Kiere suggested that sex-for-contraband allegations are not as widespread as reported. He said the charges probably came from political foes. The sheriff faces two opponents in a re-election bid this year. He said the contraband probably came through trustees who helped build a 150-bed jail addition.

Sumrow said that the truth of prisoners' grand jury testimony against the jailers was backed by polygraph examinations and that investigators have other evidence. "I have done that on every witness," Sumrow said. "The polygraphs have shown they are not deceptive."

WFAA-TV in nearby Dallas reported that during the last two years, at least ten Rockwall jailers or Sheriffs Department employees have resigned or have been fired or placed under investigation.

The station said one former prisoner likened her two months in jail on theft charges to time in a hotel. The woman, a witness in the investigation, said prisoners regularly traded sex for cigarettes or trips to a local store to buy makeup.

Sumrow said he asked the Texas Rangers to investigate just before jailer Matt Schlotman was charged in January with having sex with a prisoner. He was subsequently indicted and has resigned. The prosecutor said his office has heard similar complaints before. ■

Source: *Dallas Morning News*

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## Exhaustion Requirement Discussed \$86,250 Beating Award Upheld

The Sixth Circuit Court of Appeals held that the term prison conditions, as used in the Prison Litigation Reform Act at §1997e(a), includes claims of excessive force, thereby subjecting prisoner claims to the Act's administrative exhaustion requirement. The court also held that prisoner substantially complied with exhaustion requirements as to events occurring before passage of the Act and upheld a jury award of \$86,250 in damages.

Ohio State prisoner Richard Wolff brought a §1983 action against current and former Lebanon Correctional Institution prison guards alleging violations of his Eighth Amendment rights. Wolff charged that former guard Thomas Moore used excessive force, punching him in the face and breaking his nose, and that guard Whitlow aided in the planning and commission of the assault. At trial Moore admitted to beating Wolff and to Whitlow's participation. Whitlow denied

any involvement. Following a magistrate trial, the jury returned a verdict against both guards, awarding damages totaling \$83,250.

Prior to trial the magistrate ruled that Wolff's Eighth Amendment claims of excessive force were not subject to the exhaustion requirement of the PLRA because they did not involve prison conditions within the meaning of the statute. In response to a post-trial motion for relief from judgment based on a failure to exhaust claim, the magistrate ruled that Wolff had, in fact, exhausted his administrative remedies.

On appeal the defendants argued that excessive force claims do involve prison conditions within the meaning of the statute, that Wolff's claims were subject to the exhaustion requirement, that Wolff had not exhausted his administrative remedies, that the magistrate erred in holding otherwise and therefore the case should have been dismissed for failure to

exhaust. The Sixth Circuit held that §1997e(a)'s term prison conditions includes excessive force claims, thus rendering the magistrate's ruling here to be error.

However, the court noted that Wolff participated in investigations into Moore's actions conducted by the Ohio State Highway Patrol and three internal Use of Force Committees. The Court also noted that the assault occurred in October, 1995, well before the PLRA's enactment requiring exhaustion. Applying these facts the court articulated that when a claim arises prior to the effective date of the PLRA, but the complaint is filed afterwards, the application of the mandate may be satisfied where there has been substantial compliance. The court then held that Wolff's participation in the official investigations translated to substantial compliance with the exhaustion requirement. See: *Wolff v. Moore*, 199 F.3d 324 (6th Cir, 1999). ■

## \$12,000 Awarded in NY Work Injury Suit

On June 28, 1999, the New York court of claims awarded Leon Bienkowski \$12,000 for past general damages for injuries he suffered on a prison work detail. Bienkowski was a prisoner at the Elmira Correctional Facility in New York in 1996 when a spring loaded cylindrical plunger struck him in the mouth. The plunger was part of a photo stand he was working on as part of a prison work assignment.

Bienkowski suffered extensive dental injuries as a result of the accident, including the fracture of his upper front plate, the loss of a tooth followed by a dry socket infection where the tooth was removed. The removed tooth made it impossible for Bienkowski to use a partial plate as there was no anchor for it. The court awarded Bienkowski \$12,000 in past general damages. See: *Bienkowski v. State of New York*, Claim No. 96129. NY Court of Claims, Binghamton. ■

Source: *NY Jury Verdict Reporter*

## From the Editor

by Paul Wright

Remember that effective August 1, 2000, *PLN*'s prisoner subscription rate will be \$18 for 12 issues, and \$9 for six issues. Prisoner subscriptions will be prorated at \$1.50 per issue. Rates for non prisoners will remain the same, as those were raised two years ago.

The June and July issues of *PLN* were mailed later than usual due to some problems with our mailing list program and a transition in our desktop publishing system. We hope to be back on track with this issue. If you don't receive an issue of *PLN*, you should wait until at least the end of the calendar month in question before contacting *PLN* about it (i.e., wait until July 1 if you haven't received the June issue). More than likely the issue has been sent to you already.

The last few years have seen an increase in efforts by prisonrats to censor *PLN* nationally. In this issue we note the settlement of *PLN*'s suit against the Alabama DOC. We are in the process of filing suit against the Nevada and Wisconsin prison systems over statewide bans of *PLN* in those states. We will report the details in an upcoming issue of *PLN*.

In addition to systemwide bans, *PLN* is frequently censored at individual prisons without being afforded notice or due process of the censorship. (In many cases the prisoner subscribers aren't notified of the censorship either.) If you are a prisoner subscriber to *PLN* and your *PLN* subscription is censored, please contact *PLN*'s office and notify us of the censorship. You should also exhaust all administrative remedies and send *PLN* copies of the documentation if administrative remedies are fruitless. At that point we can attempt to find counsel to litigate the matter on our behalf. To date, *PLN* has been fairly successful in both finding counsel and litigating censorship issues.

The downside is that battling the forces of censorship consume a lot of my time (since I coordinate *PLN*'s censorship litigation around the country) and our limited staff time. Preparing for censorship suits, even with pro bono or contingency counsel, still requires assembling all the documentation,

background information, etc., necessary to get the suit underway. All of this underscores the need for *PLN* to hire a second, full-time staff person. While free speech is a good idea, it takes time and resources to assert. None of which *PLN* has in abundance.

*PLN*'s matching grant campaign is still underway. If you haven't donated to it yet, please do so. All donations by pris-

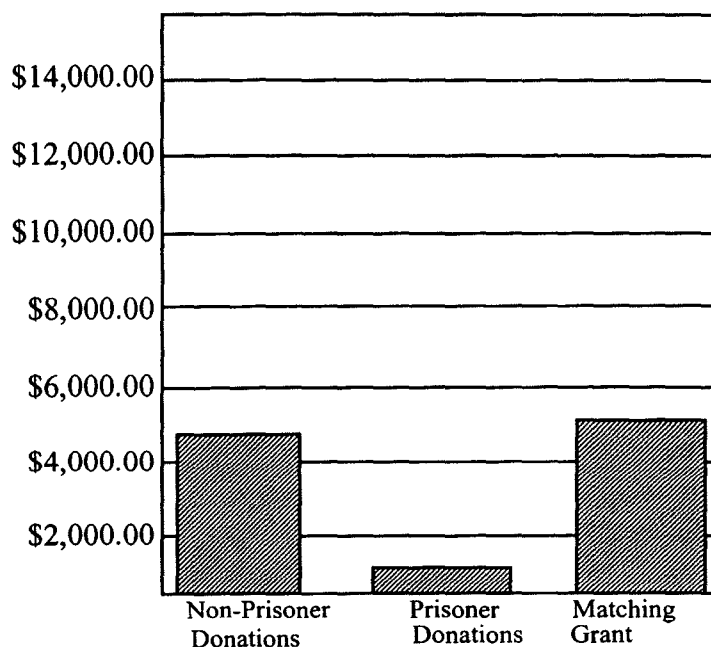
oners, above and beyond the cost of subscriptions, book purchases, etc., are matched by a *PLN* supporter at a rate of \$2 to each \$1 donated. Donations by non prisoners are matched dollar for dollar, up to \$500. For more details on the progress of our matching grant campaign see below. Enjoy this issue of *PLN* and encourage others to subscribe. ■

### Contribute to *PLN*'s Matching Grant Campaign

A *PLN* supporter will provide a matching grant for all individual donations made to *PLN* between March 1, 2000 and January 15, 2001, up to and including \$15,000. The matching grant does not apply to money sent to *PLN* to pay for subscriptions, buy books or to grants from foundations. It applies only to individual donations. Donations by non prisoners will be matched dollar for dollar up to \$500. Donations by prisoners will be matched at the rate of two dollars for every dollar given. All donations are tax deductible. New, unused stamps and embossed envelopes are fine. If you haven't donated to *PLN*'s Matching Grant Campaign yet, please do so now. No amount is too small and every little bit helps. We will announce the amount raised in our February, 2001 issue unless we meet the \$15,000 goal before then.

### Matching Grant--August, 2000

NP:\$4438.50 P:\$606.48 MGFR:\$5651.46



# Sweeping ADA/RA Jail Settlement Benefits Hearing Impaired Prisoners

by Matthew T. Clarke

A federal district court in California has approved a sweeping settlement of hearing impaired prisoners' claims in a civil rights, Americans with Disabilities Act (ADA), and Rehabilitation Act (RA) class-action suit against the Santa Clara County (California) Department of Corrections (DOC). In doing so, the court approved a settlement award of \$72,000 for the named prisoner plaintiffs, \$196,455 in attorney fees, and \$9,841 for costs.

Anthony Padilla, Criss Brown, Jill Brown, and Bruce Lambart are hearing impaired prisoners who filed a class-action lawsuit against the DOC alleging violations of Title 11 of the ADA, 42 U.S.C. § 12131, *et seq.*, and Section 504 of the Rehabilitation Act, 29 U.S.C. § 794, as well as state claims under the California Unruh Civil Rights Act, Cal. Civil Code § 51, and the California Public Accommodations Law, Cal. Civil Code §§ 54 and 54.2, *et seq.*, and a variety of other federal and state claims not specified in the settlement. Amanda K. Wilson of the Public Interest Law Firm in San Jose, CA, Linda D. Kilb and Arlene B. Meyerson of the Disability Rights Education and Defense Fund, Inc. in Berkeley, CA, and John W. Fowler, Susan K. Hoerger, and Katherine L. West of McCutchen, Doyle, Brown, and Emerson in Palo Alto, CA, represented the plaintiffs. The case was assigned to Chief Magistrate Judge Edward A. Infante.

The parties engaged in nine settlement hearings before the magistrate judge and three additional settlement meetings. As a result of the settlement negotiations, the parties entered into a sweeping twenty-two page settlement agreement detailing the following changes at DOC facilities:

- The DOC must provide writing materials for hearing impaired prisoners during and after the booking process. DOC staff must communicate with hearing impaired prisoners via writing materials upon request by the prisoner. The writing materials may be

confiscated only if detrimental to the safety of the prisoner or institution and must then be restored to the prisoner as soon as possible.

- Upon request of a hearing impaired prisoner, the DOC must provide qualified interpreters for all complex, important or confidential communication, including booking interviews, medical appointments, classification interviews, disciplinary interviews and hearings, pretrial booking interviews and programs. Programs includes all programs, classes, and other group activities for prisoners such as Alcoholics Anonymous and Substance Abuse classes, Anger Management, GED, computer classes, art classes, Industries Program and Day Release Programs. The DOC may not use some of its employees who have rudimentary sign language skills as interpreters, but must hire or contract qualified interpreters.

- In addition to the interpreter service, the DOC must make Assistive Listening Devices (ALD) and Computer Assisted Transcription (CAT) services available for hearing impaired prisoners who request them for any program or service the DOC provides. The DOC must provide for equivalent participation of hearing impaired prisoners in all programs and services. When a hearing impaired prisoner requests a specific auxiliary aid to participate in a program, the DOC must give primary consideration to the request of the prisoner.

- The DOC must maintain multiple permanent TTY/TTD telecommunication devices at various locations in the jail, similar to those where telephones are kept. The DOC must also keep portable TTY/TDD devices at various jail locations and must provide access to TTY/TDD devices for hearing impaired prisoners at jail locations without permanent TTY/TDD devices. The access to TTY/TDD devices must be at least as often as hearing prisoners have access to telephones; however, the time per call on TTY/TDD devices may not

be limited except in case of emergency. The TTY/TTD devices shall provide the following services: Relay TTY; Relay Voice; and Operator Services for the Deaf.

- The DOC must maintain at various jail locations permanent amplified telephones which allow the user to control the volume and must provide access to such an amplified telephone to each hearing impaired prisoner upon request.

- The DOC must ensure effective telephone access to the DOC by hearing impaired callers making calls to the DOC through the California Relay Service or other similar services by offering to immediately transfer all such calls to a live operator.

- The DOC must identify all hearing impaired prisoners and make them known to the classification medical services and officer assigned to housing units in which hearing impaired prisoners are incarcerated. The DOC must determine what kind of battery a hearing impaired prisoner's hearing aid uses and must maintain a supply of that type of battery at the jail and issue the battery to the prisoner upon request for as long as the prisoner is incarcerated there. The DOC must also provide repair services for prisoners' hearing aids and provide prisoners with detailed written information on the type of repair and repair vendor used.

- The DOC must inform courts in advance of court hearing that a hearing impaired prisoner is scheduled for the hearing so that the court can arrange for qualified interpreters or other aids or services to ensure effective communication.

- The DOC shall post written notification of the rights of hearing impaired prisoners in multiple areas of the jail, including the booking area and each housing unit. Video tapes developed by the DOC for prisoner use shall be captioned and have a sign language window.

- The DOC shall identify hearing impaired prisoners using color coded

## ADA/RA (cont'd)

wrist bands. Visual alarms must be installed in various parts of the jail and in all locations where visitors have free access. A plan must be implemented to ensure the safe evacuation of hearing impaired prisoners in the event of an emergency.

- The DOC must provide hearing impaired prisoners with prompt and effective notice of court appearances, appointments, interviews, meals, medical assessment and medication times and other similar announcements provided to the prisoner population.

- The DOC shall establish housing area with special services for hearing impaired prisoners the sole purpose of which is to facilitate equivalent access to auxiliary aids and services. Prisoners in such housing areas shall have equal access to DOC programs and services. The special services housing area shall include both hearing impaired and hearing prisoners. The special services housing shall include the following services: TTY/TDD units; amplified telephone equipment; visual alarms; closed captioned televisions; and officers trained to deal with hearing impaired prisoners.

The named prisoner plaintiffs were awarded \$72,000 in settlement of their individual claims. The court also awarded plaintiffs \$196,455 in attorney fees and \$9,841 for costs. In doing so, District Judge Ronald M. Whyte held that the PLRA attorney fees cap applies only to attorney fees sought pursuant to 42 U.S.C. § 1988 for civil rights violations and did not apply to suits in which the attorney fees request is made under 42 U.S.C. § 12213 and 29 U.S.C. § 794a for violations of the ADA and RA. Because the ADA and RA were the heart of the case, attorney fees awards pursuant to those statutes were appropriate and the PLRA attorney fees cap did not apply.

The DOC agreed to waive any defense to the settlement under the PLRA, including the requirement for additional findings. The DOC also agreed that, should the agreement be overturned in federal court for any reason, it would remain enforceable in state court. See: *Padilla v. Ryan*, No. C 98-20309 RMW (U.S.D.C.-N.D.CA, San Jose 1999).

## BOP Settles Medical Death Suit for \$700,000

In February, 1999, the federal Bureau of Prisons settled a medical neglect suit for \$700,000. David Deen, a BOP prisoner, was 30 years old and confined at the U.S. Penitentiary in Atlanta, Georgia for five months. He was prescribed nitroglycerin for chest pains and anti depressants by BOP medical staff. He collapsed while waiting for medication in the prison "pill line." A BOP physician's assistant saw him, but did not perform a medical examination. Deen collapsed again later that night and was taken to a local hospital where he was dead on arrival. An autopsy showed that blockage in one of Deen's coronary arteries contributed to his death.

Deen's estate filed suit, claiming BOP medical staff ignored signs of Deen's heart disease; provided inadequate follow up treatment and showed deliberate indifference to Deen's medical needs. The BOP settled the suit by paying Deen's estate \$700,000 in damages. As part of the settlement the BOP denied any wrongdoing or liability. See: *Estate of David Deen v. USA*, USDC, Atlanta, GA, Case No. 1:CV-97-0969-ODE.

Source: *Georgia Trial Reporter*

## \$14,950 Awarded in NY Window Frame Suit

On September 17, 1999, the New York court of claims awarded the estate of Carmine Tarantino \$14,950 for injuries Tarantino suffered at the Attica Correctional Facility when a window frame came loose and struck him on the head. Tarantino died of unrelated causes prior to the damages trial in this case. The state's liability for his injury was determined at a prior trial.

As a result of being struck with the window frame, Tarantino required stitches to close the wound and suffered permanent scarring. He also suffered a concussion, temporary headaches and vision problems. The court awarded \$14,950 in damages for Tarantino's pain and suffering. See: *Tarantino v. State of New York*, Claim No. 78040. NY Court of Claims, Rochester.

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## DOJ Sues Wackenhut Juvenile Prison

by Gary Hunter

In March, 2000, six teenage boys, brutalized by guards in a Wackenhut prison in Jena, Louisiana, were removed by the judge who sentenced them.

State Judge Mark Doherty of Orleans Parish Louisiana was so appalled by their treatment that he made a special trip to the Jena facility to check on the welfare of twelve other boys he had sentenced. He eventually released five more, describing Jena as "a place that drives and treats juveniles as if they walked on all fours."

One of those released was a 17-year-old whom a guard had pinned face down on the floor. The youth had recently undergone an operation for gunshot wounds to the stomach and was wearing a colostomy bag when the guard held him to the ground by placing a knee in his back.

Judge Doherty is not the only one taking action. On March 31, 2000, the Justice Department filed a federal lawsuit against the Jena Juvenile Justice Center. It is the first time the DOJ has sued a private prison company.

In this original action, U.S. District Judge Frank Polozola has been asked to add the Jena facility to a November 1998 lawsuit filed against the state of Louisiana. The lawsuit alleges inadequate care for more than 1,700 juvenile prisoners in other facilities.

The youths in Jena sometimes spent months in solitary confinement. An investigation in February, 2000, by Justice Department experts revealed that, within a two-month period, a quarter of the 276 juveniles in the Jena facility suffered some form of traumatic abuse. Many of the injuries were the result of physical abuse by guards. DOJ investigators found a disturbing shortage of necessary items like underwear, blankets, shoes, mattresses, and food.

A report by Dr. Nancy Ray cites an incident in which a shortage of food resulted in a riot as juvenile prisoners rushed a food cart.

Additionally, former Louisiana Gov. Edwin W. Edwards has been implicated in a scheme in which he received \$845,000 from former Houston mayor Fred Hofheinz for the contract to build the Jena facility. Edwards has not been indicted for the

payoffs because he was already convicted in federal court for extortion, racketeering and money-laundering in an unrelated case; making his involvement in Jena inconsequential.

Hofheinz, who won the original Jena contract, sold the rights to Wackenhut when he was unable to raise the \$12 million necessary to build the prison. Wackenhut is the second largest for-profit private prison company in the U.S. with BOP contracts that include both state and federal prisons. They also have seven facilities in foreign countries.

Wackenhut maintains that, "the bottom line is that the juvenile facility at Jena is a well managed and safe facility." One young resident disagrees. After reading a Wackenhut promotional brochure he observed, "Then I figured it out. Wackenhut was using us kids to make money."

In this case the bottom line has bottomed out. On April 26th, 2000, Wackenhut gave up their contract to run the Jena facility. ■

Sources: *Palm Beach Post*, *New York Times*

### VA Warden Fired in Foodbank Theft

On October 13, 1999, Vanessa Crawford was fired as warden of the Pocahontas Correctional Unit. Two other unidentified Virginia DOC employees were also fired. The firings stemmed from the theft of food at the Central Virginia Foodbank (CVF).

CVF was started in 1995 as a joint public/private venture whereby women prisoners at Pocahontas would process tractor trailer loads of food for CVF. Crawford and the other fired DOC employees were stealing food from the program. News accounts did not list the amounts or value of the stolen property.

Virginia prisoner Vicki Depew claims she was retaliated against and transferred to a different prison after she exposed the theft of foodbank food by Virginia prison officials. ■

Source: *Richmond Times Dispatch*

## Sixth Circuit Terminates *Glover v Johnson*

In 1977, two groups of female prisoners of the Michigan Department of Corrections (MDOC) brought two separate §1983 civil complaints against the MDOC and various staff alleging Equal Protection and First Amendment violations with regard to educational and vocational programming (female prisoners sought parity with male prisoners on these issues) and access to the courts. In 1979, the cases were consolidated, the issues tried and the prisoners prevailed. For the next 20 years the district court exercised jurisdiction over a significant aspect of the corrections system in order to monitor compliance with its remedial orders. (*PLN* has covered this case extensively. See *PLN* for 3/95, 10/96, 8/97, 12/98, 4/99 & 10/99)

In 1995, the district court denied a defense motion to terminate jurisdiction, finding that the defendants had failed to comply substantially with its remedial orders and plans. On appeal, the Sixth Circuit, while retaining jurisdiction, remanded with instructions to hold hearings to determine if the plaintiffs had achieved substantial parity with the male prisoners and to determine if female prisoners were being denied access to the courts. Following remand, the district court held hearings, following which it determined that the evidence demonstrated sufficient parity and concluded that termination of jurisdiction would be proper. The court did not address the access issue because the parties stipulated to settle the issue based on the Sixth Circuit's resolution in two other cases as well as unappealed district court rulings. *Knop v Johnson*, 977 F.2d 996 (6th Cir.1992) and *Hadix v Johnson*, 182 F.3d 400 (6th Cir.1999)

After supplemental briefing and oral arguments, the court of appeals agreed with the district court's conclusion and terminated jurisdiction over the case. With regard to the First Amendment issue, the court noted that in the event the parties have a dispute over their agreements, they can seek judicial intervention in the same manner as any other party alleging a breach of contract. See: *Glover v Johnson*, 198 F3d 557 (6th Cir.1999). ■

## WA Class B Felonies Entitled to 1/3 Good Time Credits

The Washington State Supreme Court has held: (1) a former statute placing cap on early release good time credits at 15% rather than 33% of total sentence for those "convicted of a serious violent offense or a sex offense that is a class A felony" applied only to serious violent offenses that are also class A felonies, and (2) retroactive application of amendments to the statute would violate the ex post facto clause.

James Smith and Derek Gronquist, two Washington state prisoners, filed separate personal restraint petitions asking the court to determine the applicability of former RCW 9.94A.150(1)(1996) to certain class B offenses. The court consolidated the petitions. The question under review was whether the Department of Corrections (DOC) erroneously applied the provisions of the statute when it capped petitioners' "earned early release time" (EERT) at 15 percent of their respective sentences. The court found the DOC was in error and granted the petitions.

Smith was convicted of attempted rape in the first degree, burglary in the first degree, and residential burglary. The sentences on the burglary charges have expired but Smith remains incarcerated on the attempted rape conviction. Gronquist was convicted of three counts of attempted kidnapping in the first degree and is still serving the sentence imposed for those crimes.

Attempted rape in the first degree constitutes a serious violent offense under RCW 9.94A.030(3)(a). It is a class B felony. RCW 9A.28.020(3)(b); RCW 9A.44.040(2). Similarly, attempted kidnapping in the first degree constitutes a serious violent offense under RCW 9.94A.030(3)(a). It is also a class B felony. RCW 9A.28.020(3)(b); RCW 9A.40.020(2).

The relevant statutory language under RCW 9.94A.150(1)(1996) reads: "...In the case of an offender convicted of a serious violent offense or a sex offense that is a class A felony committed on or after July 1, 1990, the aggregate earned early release time may not exceed fifteen percent of the sentence. In no

other case shall the aggregate earned early release time exceed one-third of the total sentence."

The dispositive issue is whether, under the language of the statute, an offender must have committed a class A serious violent offense or any serious violent offense in order for the 15 percent earned early release cap to apply. The DOC argued the 15 percent cap applied to all serious violent offenses regardless of their classification, but only to sex offenses that are class A felonies. Conversely, petitioners argued that both sex offenses and serious violent offenses must be class A felonies before the 15 percent cap may be imposed. Because petitioners' serious violent offenses are class B felonies, they argued their (EERT) should properly have been capped at one-third of their maximum sentences rather than 15 percent.

The court agreed with the petitioners after a broad inspection of the legislative history of the statute to determine the intent of the legislature. An appellate court address the issue in an earlier case. See *In re Personal Restraint Petition of Mahrle*, 88 Wash.App. 410, 945 P.2d 1142(1997). Revisiting that decision, the court said, "Thus, the legislative history does not support DOC's position. The best that can be said is it adds nothing to the discussion. However, given the fact the Legislature originally considered reducing earned early release for class A sex offenders only, and then included serious violent offenses without any suggestion it intended to include lesser offense classifications in this category, the more likely conclusion is that its intent was to restrict class A offenses of either a violent or sexual nature. Certainly, Senator McDonald's comment (quoted in *Mahrle*, above ["let's do it for all class A felonies"]) suggests the latter..."

Finally, the court rejected DOC's contention that recent changes made to the language at issue "clarify" the original legislative intent. After the court accepted review of this case, the Legislature

amended the statute. The court found the amended language, an addition of a comma, was supportive of the court's reading of the former statute. Further, the court found that the amended language could not be applied retroactively to petitioners. Retroactive application of a law violates the ex post facto clause if it increases the quantum of punishment for an offense after the offense was committed. *State v Hennings*, 129 Wash.2d 512, 525, 919 P.2d 580(1996).

In an important footnote to the case, the court rebuked the DOC for refusing to follow the law. "DOC filed a motion for discretionary review of the *Mahrle* decision, which this court denied by court order on November 5, 1997. Therefore, DOC was not justified in declining to follow *Mahrle*, especially in light of this court's action. Instead, in letters to the petitioners here, DOC refused to apply *Mahrle* to their identical circumstances, explaining it had determined to apply the court's holding only to the petitioner in the *Mahrle* case itself. Despite its position that *Mahrle* did not state a rule of general applicability, however, DOC nevertheless advocated the 1999 amendment to the statute, which was enacted specifically to address the *Mahrle* decision. Moreover, applying basic rule of law, the holding in *Mahrle* was clearly applicable to all persons similarly situated. At the time DOC refused to apply *Mahrle*'s holding to the present petitioners, no published Washington appellate court decision other than *Mahrle* had addressed the issue there presented. *Mahrle*, therefore, was authoritative precedent and binding on DOC as a party thereto. Given these circumstances, we find DOC's actions here troubling. We have repeatedly stated it offends the rule of law when agencies of the state willfully ignore the decisions of our courts. (cites omitted)..." See *In the Matter of the Personal Restraint Petition of James A. Smith*, 1999 WL 816087 (Wash.1999). ■

## Prison Protesters Arrested in D.C.

In a reprise of the 1999 Seattle World Trade Organization protests, thousands of activists gathered in Washington DC on April 9-17 to oppose annual meetings of the International Monetary Fund and the World Bank, the prison-industrial complex, and neoliberal economic policies.

Estimates of the number of demonstrators varied from 5,000 to 20,000 depending on who did the estimating. The total number arrested during the 8-day mobilization, a number more accurately estimated, approached 1300--more than twice the number arrested during the WTO Seattle protests.

Metro Police Chief Charles Ramsey's officers undertook preemptive strikes against potential protesters on grounds of what they might be planning to do. Such a strike occurred April 15th. International Action Center demonstrators protesting the prison-industrial complex

and demanding a retrial for black activist Mumia Abu-Jamal, were marching peacefully but without a permit near the Justice Department. Ramsey's troops swept in, sealed off the area, and arrested everyone present including tourists and World Bank consultant Leon Galindo.

Most arrestees were released the following day. "I am now far more sympathetic with the demands of the protesters and just a tad more cynical about the establishment," said Galindo after his release.

April 17th, another 600 activists were arrested and joined detainees who were practicing "jail solidarity"-- refusing to give their names or cooperate with authorities. Jailed protesters complained of physical abuses and threats, particularly from U.S. Marshals.

By April 22nd, the last 156 activists were released after volunteer lawyers negotiated a deal to reduce all charges to

minor infractions carrying a \$5 fine. The deal was struck after thousands of supporters telephoned authorities demanding the release of protesters. An e-mail message circulating among demonstrators included cell phone numbers of Chief Ramsey and other Metro Police officials.

Galindo, the World Bank consultant, wrote of abuse in jail: "To allow the police of any nation to intimidate and suppress voices through such illegal and totally stupid procedures as those used in Washington DC this weekend . . . [is to] condone what a U.S. Marshal screamed in my ear as he violently slammed me into a wall when reminded that he was violating my fundamental rights: 'Down here there is no democracy. This place is a dictatorship and I am God. If you open your mouth again I will kick your ass till you are sorry.'" ■

Tele-Net Ad

# Washington Ends Prison Telemarketing

By Paul Wright

On May 13, 1999, the Washington Department of Corrections ended its last remaining prison telemarketing program. As reported in the August, 1998, issue of *PLN*, prison telemarketing has had a controversial history in Washington prisons. In 1998 the Washington DOC ended its state run telemarketing operation at the Clallam Bay Corrections Center (CBCC) when it was discovered that Parker Stanphil, a serial rapist, was sending suggestive post cards to women who called 1-800 numbers for the state Environmental Department and the Parks and Recreation Department. Under these contracts with other state agencies, the DOC's Correctional Industries was responsible for the telemarketing operations.

When Stanphil's activities gained intense publicity, Ida Ballasiotes, the chair of the corrections committee in the state House of Representatives, called public hearings to demand an explanation. DOC secretary Joseph Lehman blamed the problem on CBCC superintendent Robert Wright and promptly fired him. The Correctional Industries manager in charge of the CBCC telemarketing operation, David Wattnem, was "reassigned" to other duties.

The closure of the CI telemarketing operation at CBCC did not affect the other prison based telemarketing operation, run by the Washington Marketing Group (WMG). WMG was a telemarketing company owned by Jim Paton, which was based at the Washington State Reformatory in Monroe. Paton also owns an Everett based telemarketing company called Legacy Enterprises. WMG was classified as a Class I industry because it was privately owned while employing prisoners paid the minimum wage to work. WMG itself was no stranger to controversy.

In 1995 *PLN* broke the story, picked up by local and national media, that U.S. congressman Jack Metcalf had used WMG and its prisoner telemarketers to campaign on his behalf using a "tough on crime" platform that included support for the death penalty. [See May, 1995, *PLN* for details.] In response to that story,

the Washington legislature introduced legislation that would have banned the use of prison slave labor in elections. The legislation died, as did subsequent legislation that would have banned prison telemarketing in its entirety. In 1997 WMG was briefly mentioned in a *60 Minutes* program as doing fundraising for the American Red Cross. After the show aired the Red Cross quietly switched its fundraising contract from WMG to Paton's outside company, Legacy Enterprises. WMG's other major contract at the time, Associated Magazine Distributors, cancelled its WMG contract in light of the publicity.

In its August, 1998, issue *PLN* reported that WMG's activities then included mortgage refinancing calls for Washington based mortgage companies such as Jonas Funding, Seafirst Bank, Ranier Mortgaging and Prime Sources. WMG's prisoner telemarketers would call homeowners with bad credit ratings in Washington, Utah, Oregon and Illinois (based on lists supplied by the mortgage companies) and if the homeowner expressed interest in refinancing, the prisoners would then get the address, appraisal value of the home, and all relevant financial information which was then forwarded to the mortgage company's loan officers for follow up.

Ida Ballasiotes is apparently an avid reader of *PLN*. On August 5, 1998, shortly after that issue of *PLN* was received, she ordered a meeting Paton, Lehman and Cathy Carlson (the DOC's private venture manager). At the meeting Ballasiotes expressed concern about WMG's mortgage refinancing business. Seeing the writing on the wall, Paton agreed to end mortgage marketing from prison.

In a letter to Ballasiotes dated January 19, 1999, Paton states WMG had ceased mortgage marketing. He notes Ballasiotes had told him at the August 5, 1998, meeting that she was concerned about prisoners "dealing with information of people on the outside." Paton also noted "you also stated you could support the industry if we were doing something else."

Apparently in response to this, WMG then began doing business to busi-

ness telemarketing, mainly selling cell phone plans for Touchtone Air Cellular, and moving services for Mayflower Moving. WMG also halted all of its telemarketing operations during the 1999 legislative session in an attempt to forestall any legislative activity. (Washington's legislature meets for three months in odd numbered years and two months in even numbered years).

On May 13, 2000, the DOC terminated WMG's contract and ordered Paton to vacate the prison premises by May 31, 1999. The DOC's termination letter of May 19, 1999, stated that any continued WMG operations "would further jeopardize the safety of WSR."

In media accounts published in July, 1999, the DOC claimed that a "routine inspection" discovered WMG prisoner employee John Anderson venturing onto the internet to shop. It was Anderson's internet escapades that were cited as the reason for WMG's immediate closure. In exclusive documents obtained by *PLN*, it was no "routine inspection" that led to WMG's closure.

Instead, a prisoner employee of WMG who identified himself as "openly gay" but who otherwise remained anonymous, sent a five page computer printed letter to various local media outlets (who apparently ignored the matter), and to Vicqui Hueitt, the WSR prison investigator who did follow up.

In his letter, the informant outlined WMG's operations and described WMG's "rules of conduct" for its prisoner telemarketers. This includes never admitting to customers that the caller was a prisoner or calling from a prison.

A DOC rule that WMG employees not bring paper or pen to the work site was apparently never enforced. What led to WMG's demise was the informant's allegation that prisoner John Anderson, WMG's technical supervisor responsible for maintaining all of the company's phone and computer equipment, cruised the internet and shopped for clothes and music CDs, with the full knowledge of Paton and WMG's civilian employees. This was a violation of DOC policy prohibiting prisoner access to the internet.

## Telemarketing (cont'd)

On April 19, 1999, Joyce Leeberg, a DOC private industries coordinator, wrote to Paton instructing him to forbid his prisoner employees from downloading private customer information provided by WMG clients. Paton was told civilian workers would have to do this.

In the meantime, prison investigators searched the harddrive of Anderson's computer. Material found included Anderson registering the computer game *Hardwood Solitaire II* with Silver Creek Entertainment, the game manufacturer. Anderson also used his credit card to order clothing from Land's End and buy vinegar for his mother from Cornet Bay Shoppe. All of the printouts show Anderson's e-mail address and credit card information. An investigator's note states Anderson's computer had internal and external modem capability and a configured, but hidden, hard drive. A telephone dial pad was found concealed in Anderson's file cabinet.

In the movie *Casablanca*, Claude Rains portrays the corrupt police inspector who is "shocked, absolutely shocked" that gambling is going on in a bar. So too with Washington prison officials and Ida Ballasiotes who are "shocked, absolutely shocked" that prisoners in general and Anderson in particular might be using prison telemarketing for something other than enriching their masters.

As early as 1988 the *Seattle Times* reported that John Anderson was being given special privileges and perks for both his computer expertise and, according to the newspaper, activities as an informant. In litigation filed by Ballasiotes over the death of her daughter by work release prisoner Gene Cain, she sought information relating to Anderson's employment by a telemarketing firm at WSR, WMG's predecessor. Anderson is also somewhat notorious as the convicted killer of seven people, making him one of the most prolific convicted killers in Washington history. (*Seattle Times, Can You Spare a Minute with a Killer?*, June, 1989).

In a separate article, the *Seattle Times* reported that DOC investigators had concluded Anderson received special perks and privileges, including being found by investigators at a DOC com-

puter with prisoner infraction histories. (*Seattle Times, Staff Inmate Ties Alarm Some*, July, 1989).

As subsequent events with WMG show, nothing came of those articles. By the time of WMG's closure in May, 1999, it was common knowledge within the prison that Anderson had Internet access and shopped on the Internet, in part, due to the fact that he bragged of doing so as well as having designed WMG's website.

Asked by the *Everett Herald* why WMG was closed down by the DOC, owner Jim Paton said "It was just politics dealing with the state." Given the sordid past of prison telemarketing in Washington, it appears Paton is correct.

As with most prison industries programs, WMG was generally popular with the prisoners who worked there. While a number of prisoners complained off the record that WMG had cheated them out of bonuses and a profit sharing scheme no evidence was provided to support these claims. While WMG prisoner employees were paid the minimum wage, along with productivity bonuses, their take home pay was substantially less with the state seizing up to 65% of their gross pay. Paton was popular because he would frequently bring pizza and donuts for his prisoner workers as an added incentive. He also provided financial assistance for some prisoners furthering their educations.

Interestingly, none of WMG's supporters were willing to speak on the record either. It appears that prison telemarketing is a thing of the past in Washington prisons. "It's a real difficult business to have and to justify its existence inside an adult correctional facility," Howard Yarbrough, the head of DOC's Correctional Industries, told media.

Private business ventures in Washington prisons are under increased pressure now due to a lawsuit filed by waterjet companies which challenge the constitutionality of the state leasing convict labor to private companies [*PLN*, Feb. 2000]. For his part, Jim Paton now offers his services as a consultant who will assist private businesses seeking to set up shop in Washington prisons. ■

## PLN Sues to Uncover Telemarketing Closure

The accompanying story on the closure of the Washington Marketing Group (WMG) operation at the Washington State Reformatory in Monroe, Washington, occurred in May, 1999. Shortly after it occurred *PLN* editor Paul Wright filed a Public Disclosure Act (PDA) request with the Department of Correction's Correctional Industries (CI) seeking disclosure of all documents relating to WMG's closure. After many months of stalling, the DOC eventually released some heavily censored documents that, among other things, concealed the identity and involvement of state representative Ida Ballasiotes in pressuring WMG over its telemarketing operations.

In February, 2000, *PLN* filed suit in Thurston county superior court seeking complete disclosure of the 59 pages of documents. In the course of the litigation CI eventually disclosed the bulk of the information. The court upheld the redaction of the names of WMG's prisoner employees showing how much money they earned in 1992-94. The DOC claimed that divulging this information would subject them to threats of strong arming, extortion, etc. [The numbers were highest in 1993, with WMG's top paid prisoner grossing \$9,629. In 1992 that same prisoner earned \$2,200. The nine prisoners listed earned an average of \$1,700 each in 1992; \$5,200 in 1993 and \$3,000 in 1994. While these wages are substantial by prison and third world standards, where prisoners and sweat shop workers are lucky to earn a few dollars a day, it is readily apparent that these are not living wages and unimprisoned workers cannot survive on these paltry wages.]

The court held that *PLN* was the prevailing party in the PDA suit and awarded *PLN* \$1,800 in statutory damages and some \$22,000 in attorney fees and costs. The case is still pending with the DOC balking at disclosing how many of its employees at the Airway Heights Corrections Center have resigned or been fired due to inappropriate relationships with prisoners. Litigation in the case continues. This appears to be the biggest fee and damage award ever levied against the

## PLN Sues (cont'd)

DOC in a Public Disclosure Act suit. Which means we can expect renewed efforts in the upcoming legislative session to exclude prisoners from the PDA. David Bowman and Shelley Hall of the Seattle law firm Davis, Wright and Tremaine represent *PLN* in this litigation pro bono. See: *PLN v. Washington DOC*. ■

### Guard's Intentional Destruction of Typewriter States §1983 and Texas Tort Claims

A Texas state court of appeals has held that a guard's intentional destruction of a prisoner's typewriter states a claim under 42 U.S.C. §1983 and Texas tort law.

Robert Gordon, a Texas state prisoner, filed suit under 42 U.S.C. § 1983 and state tort law after a guard knocked his word processing typewriter off a table during a cell search, damaging the typewriter. Before filing suit, Gordon properly exhausted his state remedies by filing prison grievances. The warden answered Gordon's grievance, stating that the destruction of the typewriter was accidental and the grievance procedure had no provision for the reimbursement of prisoners for accidental destruction of their personal property by a guard.

In the trial court, defendants moved to dismiss the suit, claiming that Gordon could not sue for intentional or negligent destruction of personal property under § 1983 so long as the state provided an adequate remedy such as the grievance system. The trial court then dismissed the suit without holding a hearing on the motion.

Following *Lentworth v. Traham*, 981 S.W.2d 720 (Tex. App.-Houston (1st Dist.) 1998), the court of appeals held that because he held no hearings on the motion to dismiss, the trial judge could not dismiss the suit based on it having no arguable basis in fact. Thus, the issue on appeal was whether the suit had an arguable basis in law.

Because it was a dismissal based on a motion to dismiss against a pro se plaintiff, the court of appeals had to liberally construe the petition and accept all of the allegations in the petition as true. In doing so, the court determined that Gordon had stated both a tort claim and a claim pursu-

ant to § 1983 for the intentional destruction of his typewriter.

The court held that neither the state nor the officials acting in their official capacities could be sued because they were not "persons" pursuant to § 1983. However, because the warden and guard failed to show that they were performing a discretionary in good faith and within the scope of the employee's authority, they were not entitled to qualified immunity and could be sued in their personal capacities.

The court also held that the prison's grievance procedure pursuant to §§ 501.007-501.008, Texas Government Code, does not necessarily provide an adequate state remedy, precluding a § 1983 claim. The legislature clearly foresaw that prisoners might sue when, pursuant to § 501.008(d), they made exhaustion of the grievance procedure a requirement prior to filing suit. Prisoners may sue under § 1983 for intentional destruction of their personal property. *Daniels v. Williams*, 474 U.S. 327 (1986). A state common law/statutory scheme exists for negligent, intentional or reckless destruction of property. Therefore, whereas the trial court correctly dismissed the claims against the warden and guard in their official capacities, it should not have dismissed the claims against them in their personal capacities. The case was returned to the trial court for reinstatement. See: *Gordon v. Scott*, 6 S.W.3d 365 (Tex. App.-Beaumont 1999)(rehearing overruled). ■

### The Irish People

Want to know what's going on in Ireland? *The Irish People* reports the activities of groups and organizations that struggle together to end the British occupation of Northern Ireland. *The Irish People* also reports on American politics and events which directly affect the situation in Ireland. This paper has excellent reporting on Irish Republican political prisoners, ex prisoners, their activities and the ongoing struggle for the release of all political prisoners in Ireland and. This weekly tabloid is the best source of news on these issues. **Subscriptions are only \$30 for 52 Issues.** Contact: The Irish People 363 Seventh Ave. New York, NY 10001 (212) 736-0107 website: <http://inac.org/>

## *AMERICA BEHIND BARS, video series from Deep Dish TV*

### *Review By Janet Stanton*

*No society since Nazi Germany has built so many prisons in such a short time. Each of those prisons is a school or a hospital that will never be built.*

--Mike Davis

This quote, from the cover of one of four videos in the Deep Dish TV series on prisons, *America Behind Bars*, underscores the perspectives on the U.S. criminal "justice" system developed in the series. The series is evidence that the independent media is rising to the monumental task of presenting an accurate/alternative view of the prison industrial complex (PIC) in contrast to the corporate news media.

The series is comprised of four videos which sketch the state of the U.S. "justice system": *Lockdown USA*, an overview of the prison-industrial complex and its effects; *The Last Graduation* covers the rise (Attica) and fall (Marist College, Green Haven, NY) of government-funded education programs for prisoners; *Millions for Mumia* documents his case, through his words and those of his supporters; and *Critical Resistance* documents the 1998 conference in Berkeley, California, hosted by Angela Davis.

(1) *Lockdown USA* is the only video of the series which explores the mechanisms behind the incarceration boom of the last few decades in detail. The first segment, called *Media: Climate of Fear*, exposes the connections between the news media which sensationalizes crime in order to "sell", and politicians who exploit fear of crime to get elected. The result is a distorted picture of crime and criminals fed to the American viewing public. For example: in 1991, the top three networks showed 571 stories about crime, and in 1993 they showed 1,636 stories, even though crime rates dropped during that time; 87% of arrests are for non-violent offenses, although the media focuses on violent crime, which in turn supports politicians trying to win with a "tough on crime" position; white collar crime costs taxpayers 7 to 25 times more than "street" crime, but white collar criminals are often not prosecuted and their crimes are not publicized. In the video this sometimes surprising information is superimposed upon images of

violence being perpetrated by the police against the "criminals" in the news and on *Cops*, and with images of sleazy politicians like Newt Gingrich acting "tough on crime". This juxtaposition highlights the disjuncture between truth and representation which exists in the corporate media - an effective use of the same media (video) to expose "misinformation".

The segment titled *The Business of Criminal Justice* points to the economic devastation of inner-city communities (80% of NY prisoners come from 4 or 5 neighborhoods) as one factor in the highly disproportionate number of black men in prison. Former prisoner and current activist Eddie Ellis of the Community Justice Center in Harlem emphasizes that the have-nots are a threat to the haves, while another activist mentions under his breath to school board election monitors that "they're trying to wipe us out". Then, white politicians from depressed rural areas are shown expressing enthusiasm over building a new prison in their area (two hundred cells per day are being built). The current prison system is compared to a third world economy where big business profits from prison labor both directly and indirectly, through exploitation of an inexpensive, unorganized and growing labor pool-all within a political economy where people of color and poor whites may have to be incarcerated in order to obtain a job. Analysts and prisoners' rights activists present this information in their communities or as voice-drops for images of the PIC- e.g.: a many-tiered cell-block, thousands of prisoners standing in front of the tiny cells while the names of Fortune 500 corporations who benefit from prison labor scroll up the screen. The video is effective as a consciousness-raising tool because it also presents communities and activists confronting the devastation and dehumanization of the PIC at each twist of the story.

*Voices From the Inside* shows a music group called The Lifers putting out powerful rap about the nightmare they face. *Youth: America's Least Wanted* covers statistics on the juvenile incarceration boom and Real House, where youthful "offenders" are "abilitated" with the powerful and sensitive guidance of

ex-prisoner Theodore "Tree" Arrington. *Closing the Door to Education* shows clips from another video, *The Last Graduation*, with images of a politician arguing in the Senate for cutting Pell Grants to prisoners, referring to them as "blind hogs". It also includes the moving valedictory speech at Marist College, the final one (in 1995) in the Green Haven Correction Facility, Green Haven, New York. prisoner Mario Andre pays tribute to his mother and her book on struggle, confronting racism and economic oppression each day and still putting food on the table for her children. The testimony of the many brilliant and compassionate people impacted by the PIC (prisoners, activists, and former prisoners aiding others) is a wrenching but inspiring antidote to the distorted picture delivered by the corporate media.

(2) *The Last Graduation* details the rise of education programs in prisons in the 1970's because of rebellions and prisoner protests, starting with Attica, and the subsequent dismantling of these programs in the '80's and '90's. Historical footage from news reports about Attica sets the stage for exploring the conditions, demands of prisoners, and after effects of the events of 1971, when 1,500 prisoners took over the prison to protest conditions. Forty-three hostages were held for four days. There is also footage of the massacre of 33 prisoners and 10 hostages, killed by the National Guard in a hail of bullets as they lay passively on the ground. This footage is interspersed with commentary from survivors.

The video then explores the contemporary experiences of former Attica prisoners, other prisoners, and educators both within and without the prison system. Teachers express joy at teaching prisoners because of their uncommon drive to learn everything, and frustration and disbelief that education programs are chosen for elimination. In other segments, prisoners are shown in classrooms and study groups, started through the guidance of ex-Attica prisoners or other prisoners with experience in prisoner self-education. They study and share scarce materials in the face of disembowelment of the education system. The end of Pell Grants for prisoners in 1994 and the last

## Video Review (cont'd)

graduation at Marist College in Green Haven Correctional Facility, New York, is explored in detail. Eddie Ellis, "Doc" Dowdy, Reverend Moore, and Lateef Islam shape the narrative backdrop for this informative exploration of education programs in prison.

(3) *Millions for Mumia* covers Mumia's case in detail through his voice and the reports and opinions of his many supporters. His case is well-presented: from the set up at the scene of the shootings and evidentiary bungling, to strong-arming of witnesses by the police, and to the unquestionably unfair trial. This video is excellent for educating the public about Mumia Abu Jamal's case and the strong national and international support he has. A short piece precedes the main video, documenting production of a play about Mumia written by John Edgar Wideman called *One Move--Live From Death Row*, featuring Bobby Watson's haunting and dreamy sax. Commentary before the show by artists, writers and activists in attendance is alternated with images of the protests of the Fraternal Order of Police, all outside the theater. This short piece includes historical footage of Mumia, the Panthers, and MOVE, as well as recent videotaped interviews with Mumia. The artists, activists, and professionals who support Mumia Abu Jamal are here joined in a reasonable, harmonious and unified voice of Millions demanding justice in his case.

(4) *Critical Resistance* documents the 1998 conference in Berkeley, California, attended by over 3000 activists, artists, ex-prisoners, professors and social workers. Although it includes the voices of powerful and outspoken fighters against the PIC such as Angela Davis, Ramona Africa and Christian Parenti, and also shows young activists speaking out, the video lacks a cohesive vision, perhaps indicative of the prisoner support and prison abolition movement itself. Musicians, artists and poets are shown strutting their stuff, and some of the panel discussions highlight the source and the nature of the PIC. But the video primarily shows artists expressing themselves to themselves, and talking heads. The video therefore points indirectly to the urgent need for in depth analysis of the

PIC as a by-product of a repressive and destructive economic system which needs to be discarded: what is to be done to create change. The topic of how this all started, whose interests it serves, the fundamental changes that need to happen and how, alluded to in all these videos, should be explored specifically and in detail.

In a time when activists and thinking people depend on the video cameras of independent persons, artists, and producers to reveal truth and spur us to action, the Deep Dish TV video series on prisons, particularly *Lockdown USA*, should be obtained by prison activist organizations and shown on cable stations and in classrooms.

For more information contact:

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## WA Guard Discrimination Suit Settled for \$250,000

In the May, 1999, issue of *PLN* we reported the widespread racism among white prison employees in the Washington Department of Corrections (DOC) and the resulting hostile work environment it created for minority employees as well as prisoners.

In July, 1998, black Clallam Bay Corrections Center guards Doris Washington, Charles Jackson, Collins Bailey, Earnest Grimes and Valinda Andrea, filed suit in federal court in Tacoma claiming they had been subjected to a hostile work environment that included, but was not limited to: white guards referring to blacks as "coons" and "niggers"; the targeting of minority prisoners for beatings by guards; black guards receiving death threats from their white co-workers and white employees at the prison bragging about their membership in racist and white supremacist groups. [For a fuller description of the lawsuit and rampant racism in the Washington prison system see: *Black Guard, White Guard: Racism in Washington DOC Continues*, *PLN*, May, 1999. The article is

also posted on *PLN's* website at: [www.prisonlegalnews.org](http://www.prisonlegalnews.org).]

In March, 2000, the Washington DOC agreed to settle the CBCC guards' lawsuit by paying them \$250,000. This amount includes attorney fees and costs. The DOC denied any wrongdoing in the matter.

What is unusual about the settlement, which has been obtained by *PLN*, is its media provision: "4. The parties and their legal counsel agree that they shall not directly or indirectly initiate any contact with any media regarding this case or its settlement. The parties recognize that this settlement is a mutual agreement intended to avoid the risks of a trial. In the interest of returning to a more harmonious work place, the parties agree to respond to any media inquiries without the use of inflammatory allegations or disparaging comments or statements about any other party." This provision is apparently in response to a press conference held by the plaintiffs when the suit was filed, where they recounted the racist attacks they had been subjected to by their fellow DOC employees.

The Washington DOC censored the May, 1999, issue of *PLN* and a March, 1999, issue of *The Seattle Weekly* because of the article exposing the widespread racism in the Washington prison system. *PLN*, *The Seattle Weekly* and Jennifer Vogel, the article's author, have filed suit challenging that censorship, and the case is still pending. Washington DOC officials are more concerned with covering up and concealing the widespread racism within the prison system than they are with addressing it. But, an essential element of the employee racism suits (a similar suit by black prison employees at the Washington Corrections Center in Shelton is still pending) is that the Washington DOC's senior administrators encourage and tolerate overt, violent racism by their employees. As this settlement shows, maintaining a racist, hostile work environment doesn't come cheap at \$250,000 a pop. See: *Washington v. State of Washington*, US DC, WD-WA, Tacoma, Case No. C98-5368-FDB. ■

# Notes From The Unrepententiary: Transcending Hell

By Marilyn Buck

**N**uh Albert Washington was a friend, brother and comrade to me and many others. He died this Spring. He was a Black Panther, a Muslim and a soldier of the revolutionary Black Liberation Army. He was a political prisoner, a hostage of the U.S. government's war against the Black Liberation movement. For 29 years.

Nuh was isolated from all other BLA prisoners; they were all held separated from each other. Those were torturous years of deliberate dehumanization. However, Brother Nuh didn't just survive, he maintained his integrity as well as his vision of liberation and justice. And he grew, like a sturdy oak tree; his growth fortified those prisoners on the ground with him. His roots spread beneath and through the walls to other political prisoners as well as comrades, family and friends beyond the dungeons in the world.

Nuh was a man of wisdom and exquisite spirit. Witness Spiderman:

I have never been bitten by a radioactive spider  
So I cannot climb walls  
Or defeat a bunch of bad guys at once  
But like Spiderman I have a sense of humor  
Yet I'd give up some of this humor  
To be able just for a few hours  
To climb walls and bend bars  
So as to leave this place without humor  
And laugh at their wonder of  
how did he do that?

And Nuh did do that, grow in hell?

For all prisoners, whether we face a lot of time or only a "few years," this is a serious fundamental question. It is an agonizing one for most of us, much of the time. How to do it? How to maintain? How to grow and resist dehumanization? How many of us verbalize - to ourselves, or to each other - such a question? How often do we stop to examine the state of our spirits? After all, prison is a constant gauntlet we must run throughout the howling, beating circumstances of our sentenced days. We are stripped bare, our hearts are kicked and punched. If we aren't vigilant our hearts become scarred, tough

like a punching bag - resilient but strawfilled (or in 2000 is that plastic foam filled?). We throw up shields-defensive walls that seal shut our tombs.

Nuh resisted cruelty and callousness. He took inventory, explored the reaches of liberation from within, as well as the responsibilities of liberation without. I think he became softer in those 29 years, not harder.

Like many other male prisoners, he missed women. But he didn't just miss us as overblown objects of desire and 15 minute dreams, or as objects to do a man's bidding, but rather as human beings who had much to offer from our own intelligence, creativity and wit. Nuh even took up Women's Studies to understand more clearly women's oppression and its relation to the liberation of all humanity. He was preparing to leave prison without a desperate need or "right" to own, abuse, or misuse women; although what other right would be left for him as a Black man, a worker and a prisoner? He knew that when one is himself oppressed, defiled and brutalized, one might believe he can gain control over self by exerting control over others - women, children, other oppressed peoples, classes or groups. He listened to his sisters and women friends who wrote him, who were his comrades. He learned about our need for equality and justice, as well as about our suspicions and observations that we women have not fared well in most societies in the world. Not even in some of those that won wars of liberation in which women "held up half the sky" as teachers, workers, mothers and combatants. Women too were tortured and killed by the colonizers and dictators for being part of those liberation struggles; but some nations have forced women back to the servants' quarters and/or "diminished capacity" status or "protective custody."

Nuh was well prepared to leave prison a full human being, despite the scars of his 29 year torture. He died too soon. Too many prisoners die too soon, many having given up, without having explored seriously the possibilities of living. No one really wants to die in prison, separated, isolated. To die in prison is a nightmare for most of us, even

when our waking daymares might make us want to escape into the oblivion of death.

If one looks into living, even if it's in a subversive corner of his or her heart, hidden from the keepers, one can grow, become a tree. Any prisoner can burst through the concrete of our constricted existence. I know, I'm fortunate to know many who do. The decision about our humanity rests upon ourselves, not in the system's dictates and pronouncements about our bestiality, depravity and inhumanity.

Nuh died well, a loving, warm human being. His transcendence absolves neither the U.S. government nor its prison minions. His passing thunders the lack of justice in Amerikkka. We as prisoners must become advocates of justice for ourselves and all others who suffer the consequences of oppression and exploitation. What else should we be doing with all this time? ■

## SC Prisoners Settle Rape Suits

On October 16, 1999, an unidentified former woman prisoner settled a lawsuit for \$115,000. The woman claimed that in 1995 while she was imprisoned at the Women's Correctional Center in Broad River, South Carolina, prison guard Anthony Green raped her and South Carolina prison officials then denied her rape crisis counseling and psychiatric help for two years after the rape.

Green later pleaded guilty to committing the rape and was sentenced to seven years in prison and three years probation.

On December 15, 1999, an unidentified woman prisoner was awarded \$82,500 in damages by a jury who found she had been raped by a male prisoner in July, 1998, while she was a prisoner in the Lexington county jail in South Carolina. The county did not appeal the verdict and said it had already spent \$209,640 on attorney fees and expenses in the case. The plaintiff victims were not identified in newspaper accounts as the publications have policies against identifying the victims of sexual assaults. ■

Source: *The State*, South Carolina

## \$2 Million Awarded in IL Medical Neglect Suit

On February 2, 2000, a federal jury in Illinois awarded \$2 million in damages to a prisoner blinded through medical neglect by prison officials. The damage award is believed to be the highest in a prisoner civil rights case in Illinois.

Karl Williams, a prisoner at the Pontiac Correction Center in Illinois, was operating a trash compactor in 1995 when a hydraulic line broke loose and injured his left eye. Williams was immediately taken to the prison hospital but the doctor on duty was too busy to see him. Williams did not receive medical care for his eye for 90 days, by which time he was blind in that eye. After four surgeries, Williams lost his left eye and, due to infection and inflammation, is losing sight in his right eye as well.

Williams filed suit in federal court claiming the prison doctor, Ghansyam Patel, was deliberately indifferent to his Eighth Amendment right to be free from cruel and unusual punishment. After a two day trial and five hours of deliberation, the six member jury returned a verdict finding Dr. Patel liable for William's injury. The jury awarded Williams \$1 million in compensatory damages and \$1 million in punitive damages.

Williams' attorney, Kathleen T. Zellner, told media: "I think they were sending a message on the punitives that you cannot ignore something this serious, even if the injured person is a felon. There's really no excuse for it." The Illinois attorney general's office, who represented Patel, declined to comment on the case.

A year before the claims against Patel went to trial, Williams settled his claims with Illinois Valley Disposal Services, the company that hooked up the hydraulic lines to the trash compactor. The company paid Williams \$35,000 to settle the claims against it. See: *Williams v. Patel*, US DC, CD IL, Case No. 96-1369. ■

Source: *Illinois Journal*

## Attorney Fee Award Against Prisoner Reduced

A federal court in Virginia reduced an attorney fees award against a prisoner who filed a factually frivolous suit from \$28,719 to \$900.

John McGlothlin, a Virginia state prisoner, filed a civil rights suit under 42 U.S.C. § 1983 against the warden and chaplain of his prison, claiming Islamic prisoners were subjected to unconstitutional religious discrimination. Following an evidentiary hearing in which it became apparent that McGlothlin could not prove the facts of his suit, the trial court denied relief. McGlothlin appealed all the way to the Supreme Court and lost. The defendants then requested and were granted \$28,719 in attorneys' fees. McGlothlin appealed and the Fourth Circuit remanded the case to the district court, instructing it to apply the twelve factors in *Johnson v. Georgia Highway Express*, 488 F.2d 714 (5th Cir. 1974) as guidelines for the proper awarding of attorney fees.

On remand, the district court recalculated the award of attorney fees. Finding that many of the *Johnson* factors would only apply to a prevailing plaintiff, not to government officials defending themselves in a civil rights action, the district court nonetheless found that the fee award was reasonable for the two attorneys who had to defend the action, which was complicated by McGlothlin's "endless flood of pleadings." However, the court also noted that two additional factors should be considered when contemplating an attorney fees award against a civil rights plaintiff representing himself: "(1) the importance of ensuring access to the courts for plaintiffs with civil rights complaints, and (2) the financial means of the plaintiff." Noting that attorney fee awards against prisoner plaintiffs in similar cases have been rare and low, that the chance of the defendants ever collecting even a reduced award was low and that a large award might discourage other prisoners with legitimate civil rights claims from attempting to access the judicial process, the court reduced the attorneys' fees award to \$900. See: *McGlothlin v. Murray*, 54 F.Supp.2d 629 (W. D.Va. 1999). ■

## \$1.75 Million in Oregon Excessive Force Jail Settlement

On March 29, 2000, the Klamath County Jail in Medford, Oregon, paid \$1.75 million to settle an excessive force lawsuit filed by a former jail detainee. In 1997 Dana Lecomte was in the Klamath county jail on charges of driving with a suspended license. Jail guards claim Lecomte was "out of control" and "in danger of causing himself serious injury" by repeatedly banging his head against a jail wall.

To prevent serious injury, jail guards then proceeded to handcuff and leg shackle Lecomte while he was strapped into a restraint chair. Lecomte was doused with large amounts of pepper spray and subjected to at least two chokeholds. As a result of the choke holds, Lecomte lapsed into a coma for 71 days and suffered permanent brain damage, leaving him with the mental capacity of a two year old and requiring 24 hour a day care.

Lecomte filed suit claiming the jail guards' use of excessive force violated his constitutional rights and caused his injuries. Eight days into a civil trial in federal court in Medford, Oregon, the county and its insurance company agreed to settle the case by paying Lecomte \$1.75 million.

Lee Werdel, Lecomte's lawyer, said, "We regard this as neither a good or a bad settlement given the amount of damages. The settlement amount is acceptable. We're not thrilled with it." Klamath County sheriff Carl Burkhart denied Lecomte's injuries were caused by jail guards. ■

Source: *The Oregonian*

### Correction

In the June, 2000, issue of *PLN* we reported that Elizabeth Feil, a prison psychologist in Maryland who helped her lover escape from prison, had been sentenced to six years in prison and three years probation. This was a typographical error. Feil was sentenced to six months in jail and three years probation for her role in the escape.

# Political Prisoners In Spain

By Julia Lutsky

Political prisoners exist in every country and every country denies their existence. Spain is no exception. It has seen three distinct waves of modern political prisoners: those who defended the popularly elected Spanish Republican Government against Francisco Franco's 1936-39 rebellion; those who opposed the resulting dictatorship which lasted until the generalissimo's death in 1975; and those who opposed the reforms carried out since that time as nothing more than window dressing.

At the end of 1974 there were about 2,500 Spanish political prisoners whose presence was consistently denied by the Spanish government. Immediately after the death of Franco, ETA (Basque) political prisoners went on a hunger strike to obtain their freedom; the government responded with a limited pardon of some 235 political prisoners and again claimed that since there were no "real" political prisoners there would be no more pardons: all the others were either guilty of common crimes or were terrorists. Most of those freed were reformists, i.e., those who would laud any so-called political reforms; revolutionaries remained behind bars. As a result, amnesty campaigns and petitions on their behalf continued. In 1976 a massive demonstration by some 100,000 people in Bilbao was followed later the same month by the explosion and destruction of more than 40 fascist monuments.

The Spanish government had originally housed political and common, or social, prisoners together to create the impression there were no political prisoners. This policy backfired when, as a result of the amnesty campaigns carried on for political prisoners and their unity in hunger strikes, social prisoners united to form their own group in protest of prison conditions and for a general amnesty. Political prisoners had already formed themselves into communes in order "to maintain a high degree of vigilance without relaxing because to do that allows the prison to devour the prisoner." The communes produced small goods for sale to support the commune itself and to assure that their families not be assessed the cost of their incarceration.

In Spain, prisoners receive minimal food of poor quality; those whose families and friends can provide for them do so, those whose families and friends cannot simply survive the best they can. This is also true of prisons in Latin America. A second major objective of the communes was political study and discussion. The Carlos Marx Commune for men at Soria and the Carmen López Commune for women produced many works on political theory. Political prisoners allied themselves in the struggle being waged by the social prisoners bringing their communal experience to the social prisoners.

During 1977 there were more than 50 uprisings by social prisoners, nine of which produced great destruction and fires. The Communist Party of Spain (Reconstituted) [PCE(R)] supported these rebellions and presented a democratically based penal code which it published in the *Red Gazette* of 15 November 1977. Though the Party maintained a sharp distinction between political and social prisoners, it supported the latter's call for amnesty and for the improvement of prison conditions. The same is true of GRAPO, (*Grupos de Resistencia AntiFascista Primero de Octubre*) a group practically synonymous with the PCE(R). Together these two clandestine Marxist parties have fought fascism in Spain since the days of the Franco regime. And they have paid a steep price when, during the struggle, their members have been captured, imprisoned, tortured and killed. At the end of 1977 the government was finally forced to issue further pardons, freeing all but the militants involved in bombings, kidnappings and assassinations. At the same time this amnesty was granted, however, the entire Central Committee of the PCE(R) was imprisoned.

The 1979 penal reforms were both swift and not unexpected. They were primarily directed against both the communes formed by the political prisoners and the groups formed by the social prisoners. The most active of the social prisoners were isolated and subjected to the same harassment by guards previously suffered by political prisoners.

Packages of food were forbidden; only prison mess was allowed. As a result many prisoners became ill. Electric cattle prods were introduced. Ironically, Spain had abolished the death penalty in a new constitution; as a result, the most active of the political and social prisoners were simply beaten to death by prison guards.

The most innovative of the measures was the introduction of isolation and supermax prisons: As the Director General of the Prisons, Andrés Márquez, said in 1986, "Maximum security is obtained with maximum isolation." Keeping prisoners incommunicado was obtained by replacing galleries with modules. The smaller space brought the entire weight of the penal system to bear on each prisoner. To keep prisoners in such maximum security required the construction of special maximum security prisons in isolated locations so that prisoners would receive no outside stimulus whatsoever. Upon arrival at these new penitentiaries prisoners were greeted by jailers armed with clubs standing in two files. Each new prisoner was required to run between the two files surviving as best he or she could. Here were housed the leading political and social prisoners, subjected to a life based on humiliation: strip searches, nocturnal searches, single file counts and recounts, censorship, walking against the wall with eyes forever cast down, video cameras everywhere. Though the modern use of isolation was introduced in the early 1980s in USP Marion in Illinois, the Pennsylvania system, one of two models in use in the first American prisons of the early 19<sup>th</sup> century was based on isolation. "[P]risoners served their sentences confined in individual cells, where they ate, worked and slept in isolation... Over the course of their sentence, they were given nothing to read except the Bible and were prevented from corresponding with friends and family..." [*The Oxford History of the Prison*, ed. by Norval Morris and David J. Rothman, 1995, p. 119]

Since combining social and political prisoners had proved disastrous, the government maintained a policy of even more complete segregation; social and political prisoners were confined in separate prisons. A series of hunger strikes

## Political Prisoners cont'd

erupted in 1978 and 1979 and again in 1980. PCE(R) and GRAPO prisoners in the prison at Herrera de la Mancha demanded better conditions and an end to the beating of prisoners to the point where they needed immediate medical attention including stitches. A massive hunger strike at Herrera in 1981 resulted in forced feeding. Finally, in June of that year, one of the political prisoners, Crespo Gallendo, died.

These strikes were supported by popular protests in the streets to the extent that, faced with Crespo's death, the government was forced to negotiate; in 1983 prisoners were finally moved from Herrera to another prison, Soria, where they were allowed to regroup in communes described above and maintain collective life under reasonably acceptable conditions. This ended in 1987 when the government again undertook a policy under which political prisoners would be dispersed throughout the entire prison system rather than held in separate prisons or sections

of prisons. Prisoners responded with another hunger strike in 1989. In spite of a court order forbidding it, forced feeding was again threatened. As a consequence, the doctor primarily responsible for the forced feeding of PCE(R) and GRAPO political prisoners during the 1981 hunger strike was shot and killed in his private office. The strike continued for 14 months into 1991 when the PCE(R) ordered an end to it: Another prisoner, José M. Sevillano, had died of starvation and many others were incapacitated. "Nothing has been obtained from the government, we have lost comrade Sevi and the health of others has been broken. But the state ... has not succeeded in destroying us nor in the demoralization of our imprisoned comrades as they intended." By this time the struggle of the prisoners was known not only in Spain but throughout the world.

More prisons were built, enough to hold 20,000 more prisoners, and a new penal code was devised in 1995. These measures were met by another massive hunger strike. Thus it has been: an escalation of the pressure of prison conditions

is met by hunger strikes. Gradually prisoners are released as a result of negotiations to end the strikes. It is an example of resistance that has worked. But at a terrible price. The armed struggles of the PCE(R), GRAPO to overthrow the existing Spanish government, and that of the ETA for Basque independence continue. There are presently approximately 45,000 people in Spanish prisons. Of these about 400 are ETA and another 40 belong to the PCE(R) and GRAPO.

For more information you may contact AFAPP, (*Asociación de Familiares y Amigos de los Presos Políticos*, Apartado de Correos 15.220, E 28080 Madrid, Spain. The e-mail address is [eurotheo@cps.ucm.es](mailto:eurotheo@cps.ucm.es). Information on Spanish prisons and prisoners is also available at the following web site: [www.nodo50.org/iusred/Penit/Menu.htm](http://www.nodo50.org/iusred/Penit/Menu.htm) and from [iusred@nodo50.org](mailto:iusred@nodo50.org). ■

Source: [www.ucm.es/info/urotheo](http://www.ucm.es/info/urotheo), *Universidad Complutense de Madrid* - *Facultad de Derecho, Texto Crítico*

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## California Statute of Limitations Tolled

The U.S. Court of Appeals for the Ninth Circuit has held that; (1) amended California tolling statute could be retroactively applied to former prisoner's claim; and (2) former prisoner was not entitled to equitable tolling.

David Fink, a former California prisoner, filed a civil complaint under 42 U.S.C. § 1983 in a federal district court seeking damages for alleged Eighth Amendment violations for inadequate medical treatment while he was incarcerated. He claimed that his leg was injured on September 2, 1993 after a prison guard beat him while he was handcuffed. He walked on the leg for eight weeks without crutches. On November 9, 1993, a prison doctor allegedly refused to treat his leg or to issue crutches. Fink was released from prison on August 27, 1996 and commenced his complaint on May 29, 1997.

### A. Retroactivity.

The district court dismissed Fink's complaint as time-barred applying a 1994 California Civil Procedure Code, § 352.1, retroactively. As amended in 1994, § 352.1 limits tolling of limitations periods to two years for prisoners incarcerated for less than life. Before the amendment, imprisonment was considered a disability that tolled statutes of limitations for the entire person term. That provision was repealed effective January 1, 1995.

Because § 1983 does not contain a statute of limitations, federal courts apply the forum state's personal injury statute of limitations for § 1983 claims. California's applicable statute of limitations is one year. Federal courts also apply a forum state's law regarding tolling, including equitable tolling when not inconsistent with federal law.

The court determined that Fink's Eighth Amendment claim accrued on November 9, 1993 when the prison doctor allegedly refused to treat his injured leg. Fink's complaint was not filed until May 29, 1997—over three and a half years after accrual. Thus the one-year statute of limitations barred the action, unless the period was tolled for more than two and a half years.

The dispositive issue for the court was whether application of § 352.1 retroactively to this case would improperly bar

Fink's Eighth Amendment claims. The district court found Fink's claim expired November 9, 1996 which included two years of tolling plus the one-year limitation period. The district court determined that applying the new § 352.1 retroactively to Fink's action did not violate due process. The appellate court agreed. The court relied on the legislative intent wherein relevant case law stated; "By enacting this legislation, the Legislature intend[ed] to limit the ability-to bring lawsuits by prisoners when the facts that give rise to the lawsuits are old, and difficult to prove or disprove." *Parker v Marcotte*, 975 F.Supp. 1266 (C.D.Cal.1997) (quoting 1994 Cal.Legis.Serv.Ch. 1083, § 1, S.B. No. 1445 (West). Fink would have had a claim that retroactive application of the 1994 § 352.1 (effective 1/1/95) might result in a manifest injustice if he had not waited so long after the effective date to file his claim. The appellate court found that his May 29, 1997 filing date was far too long a period after that effective change in the law and thus precluded a "manifest injustice" claim.

### B. Equitable Tolling.

Fink finally argued that the district court should have equitably tolled the statute of limitations. Under California law, a plaintiff must meet three conditions to equitably toll a statute of limitations: "(1) defendant must have had timely notice of the claim; (2) defendant must not be prejudiced by being required to defend the otherwise barred claim; and (3) plaintiff's conduct must have been reasonable and in good faith." *Bacon v City of Los Angeles*, 843 F.2d 372,374 (9th Cir.1988). The court found Fink had met the first two conditions but failed to support the "reasonable good faith" claim. Fink attempted to amend an earlier pending complaint *Fink v Gomez*, No. Civ. S-94-1521 (E.D.Cal. Sept. 24, 1994) to include his injured leg claim. The court found the injured leg claim was completely unrelated to the other claims asserted in the *Gomez* complaint. Fink sought to add seventeen new defendants and four new causes of action to *Gomez* in which a summary judgment proceeding was pending in that case.

The court concluded applying § 352.1 retroactively did not result in manifest injustice to Fink nor did the circumstances of the case justify equitable tolling. See *Fink v Shedler*, 192 F.3d 911 (9th Cir.1999). ■

## \$800,000 Settlement in AZ Jail Restraint Suit

In August, 1999, the Maricopa County board of supervisors, approved an \$800,000 settlement for a pretrial detainee subjected to excessive force in the Maricopa County (Phoenix) Jail in Arizona. Richard Post, a wheelchair bound paraplegic was arrested and taken to the county jail.

Post claimed he was denied a catheter he needed to urinate and was ignored when he sought medical aid. To get medical attention Post flooded his cell. Jail deputies responded by ordering him to clean up the mess, then took him out of his wheelchair and shackled him in a "restraint chair" for several hours which compressed his spine and left him even more disabled by causing further paralysis.

Post's lawyers also claimed that jail officials withheld video tapes of the incident for two years and then doctored the videos they eventually did release. As part of the settlement the defendants did not admit to any wrongdoing or liability. The settlement was paid entirely by county taxpayers as the county's insurance policy has a \$1 million deductible.

The Maricopa County jail is operated by Joe Arpaio, self described as "America's toughest sheriff."

While Arpaio's media grandstanding antics (tent jails, chaingangs, feeding prisoners green bologna sandwiches, making them wear pink underwear and striped uniforms, etc.) have won him a lot of publicity, the brutality and medical neglect endemic to his jail are just as widely ignored by the national media. ■

Source: *Arizona Republic*

## WA Court Costs Can Be Remitted

A Washington State Court of Appeals, Division One, held that: (1) the State may be awarded costs under RCW 10.73.160 even if an indigent prisoner's appeal raises debatable issues; and (2) a defendant whose conviction has been affirmed may petition the sentencing court at any time for partial or complete remission of the obligation.

On February 16, 1999, the court affirmed Thomas Robert Nolan's conviction. On February 22, 1999, the State moved for an award, as prevailing party, under RCW 10.73.160. The State asked the court to order Nolan, an indigent prisoner, to pay \$82 to the Snohomish County Prosecutor's Office for the cost of reproducing the State's appellate brief, and \$3,328.80 to the Appellate Indigent Defense Fund to recoup fees for Nolan's court appointed appellate counsel. On March 2, 1999, the Court of Appeals Commissioner awarded costs to the State in the amounts requested. On April 1, 1999, Nolan moved to modify this ruling. Then on July 12, 1999, the State requested an additional \$225 for appellate costs incurred after February 22, 1999.

Nolan argued that RCW 10.73.160 means that an indigent appellant in a criminal case will not be ordered to pay costs and fees unless his or her appeal lacked merit. Nolan relied on an opinion in *State v. Edgley*, 92 Wash.App. 478, 966 P.2d 381(1998), review denied, 137 Wash.2d 1026, 980 P.2d 1285 (1998). In that case, after affirming two juvenile adjudications, the court of appeals for Division Two addressed the State's request for costs on appeal under RCW 10.73.160 and Title 14 of the Rules of Appellate Procedure. The court opined that the "purpose of awarding costs to prevailing parties is to discourage meritless appeals." Because the appeal raised debatable issues, the *Edgley* court denied the State's request for RCW 10.73.160 attorney

fees and costs on appeal. Nolan asserts, although the court in his case affirmed his conviction, because his appeal raised debatable issues the State's cost bill should be rejected.

The court sitting in Nolan's case did not construe *Edgley* as setting down a bright line rule for the exercise of appellate discretion to deny appellate costs. The Nolan court opined that the *Edgley* appeared to have been stating its basis for exercise of discretion in that particular case. In either event, the court disagreed that the fact that an appellant may have raised debatable issues is an appropriate ground for the exercise of discretion to deny the State the opportunity to recoup appellate costs where the indigent may, at sometime before expiration of the period in which judgments may be enforced, become able to repay those costs without undue hardship. The court pointed out that the test before collection may be had is financial hardship--not the relative merit or lack of merit of the issues raised on appeal. Nolan made no showing of compelling financial hardship circumstances.

The opinion advises that "the recoupment statute provides that a defendant whose conviction has been affirmed may petition the sentencing court at any time for partial or complete remission of the obligation where payment will impose manifest hardship on the defendant or upon his or her immediate family--this without regard to whether the appeal raised debatable issues or was totally devoid of merit.

The court denied Nolan's motion to modify the Commissioner's ruling awarding costs to the State, and referred the State's request for additional costs back to the commissioner of the court for disposition. See *State v. Nolan*, 988 P.2d 473 (Wash.App.Div.1 1999). ■

### PLN On the Air

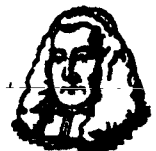
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# One-Year NY SHU Atypical and Significant Hardship

by Matthew T. Clarke

A federal court in New York has held that one year in SHU is an atypical and significant hardship pursuant to *Sandin v. Conner*, 515 U.S. 472 (1995). The court also held that a prisoner must exhaust state remedies with respect to medical indifference claims, but need not exhaust state remedies with respect to excessive use of force claims.

Melvin Wright, a New York state prisoner, filed suit pursuant to 42 U.S.C. § 1983, alleging that prison guards used excessive force on him, guards and nurses denied him medical treatment and a prison disciplinary official denied him due process in a disciplinary hearing. The prison officials filed a motion to dismiss the suit. The court denied the motion in part and granted it in part.

The court took the following facts set forth in the complaint as true: while he was recovering from surgery and still under the influence of anesthesia, Wright accidentally grabbed a nurse's hand, injuring her. A misbehavior report was filed against Wright for the hand grabbing incident. Wright was given a staff assistant to help defend himself and asked the assistant to get him information on anesthesia and interview the anesthesiologist and another prisoner who witnessed the incident. However, the assistant did none of this.

An initial hearing on the disciplinary charges was held. The disciplinary official denied Wright any witnesses and adjourned the hearing because the injured nurse was unavailable to testify. A subsequent hearing was again adjourned.

On the way back from the subsequent hearing, five guards assaulted Wright in a secluded by-pass tunnel. Wright was taken to the prison's emergency room with severe injuries to his back, right shoulder, and thumb. One of the guards told the nurse that Wright had no injuries, so the nurse wrote "no injuries" in his medical record and refused Wright medical treatment. Complaining of extreme pain later that day, Wright was again refused medical treatment due to the nurse's "no injuries" entry.

Subsequently, Wright was informed that he had been found guilty of a disciplinary infraction at a hearing held in his

absence and had been given 36 months in SHU as a penalty. Administrative appeals by Wright and an Article 78 action resulted in the penalty being first reduced to 24-months, then overturned. However, by then Wright had spent 12 months in SHU.

Wright sued the guards who allegedly beat him and the prison officials involved in the disciplinary hearing and appeal. The defendants moved for dismissal alleging Wright had failed to exhaust his administrative remedies as required on issues involving prison conditions by the PLRA, 42 U.S.C. § 1997e(a). The court held that the use of excessive force is not a "prison condition." Therefore, the PLRA does not require exhaustion of administrative remedies prior to the filing of an excessive force claim. The court also held that a deprivation of medical care claim does involve "prison conditions" and does require exhaustion of administrative remedies. However, because Wright alleged that he did exhaust administrative remedies in his opposition to the motion to dismiss and the defendants did not contest that assertion, Wright had proven exhaustion sufficiently for purposes of the motion to dismiss.

Pursuant to *Sandin v. Conner*, 515 U.S. 472 (1995), a prisoner only has a right to procedural due process when the deprivation imposes an "atypical and significant hardship on the inmate in relation to the ordinary incidents of prison life." The court held that it could not say Wright's assignment to the SHU for three years and loss of three years of good time were not atypical and significant hardship as a matter of law.

The defendants also claimed a right to qualified immunity. However, the court ruled that a prisoner's right to procedural due process in disciplinary hearings before an atypical and significant hardship was imposed had been clearly established at the time of the disciplinary hearings and procedures laid out in *Wolff v. McDonnell*, 418 U.S. 539 (1974).

The defendants argued that, because Wright failed to allege a

physical injury he could not recover compensatory damages for the denial of procedural due process claim. The court agreed, ruling that--pursuant to the PLRA's physical injury requirement, 42 U.S.C. § 1997e(e)--Wright could recover only nominal damages. The court also denied Wright's request for an injunction requiring his return to his earlier, lower security prison. The case was allowed to proceed on the excessive force and denial of medical treatment claims. It was allowed to proceed for nominal damages only on the procedural due process claim. See: *Wright v. Dee*, 54 F.Supp.2d 199 (S.D.N.Y. 1999). ■

## Attention Prisoners!

Due to increasing postage and printing costs PLN can no longer avoid increasing its prisoner subscription rate to \$18 per year from our current rate of \$15 a year. We delayed increasing our prisoner subscription rates for over two years. The new subscription rate goes into effect on August 1, 2000. Prisoners can subscribe, renew lapsed subscriptions or extend current subscriptions for as many years as they want at the \$15 rate until then.

After August 1, 2000, we will prorate subscriptions at \$1.50 an issue, or \$9 for six issues and \$18 for a full year. Subscription rates for professionals/institutions (\$60 per year) and non prisoners (\$25 per year) will remain the same because we raised those rates in 1998. As always, prisoners can pay for their subscriptions with new, unused stamps and embossed envelopes.

## CA 3 Strikers Entitled to Good Time

The Supreme Court of California held that: a defendant sentenced under the three strikes law (Pen.Code § 1170.12) is entitled to presentence conduct credits under Pen.Code § 4019.

Otis Michael Thomas, a California prisoner, was found guilty of first degree residential burglary (Count 2, § 459), making a terrorist threat (Count 3, § 422), possession of a firearm by a felon (Count 4, § 12021, subd.(a)(1)), and false imprisonment of a hostage (Count 5, § 210.5). The jury found true the allegation that he was armed with a firearm in the commission of Counts 2, 3, and 5. The jury also found that the victim of the terrorist threat charge suffered reasonable sustained fear for her safety and that of her immediate family. As relevant to the case, the jury found he had previously been convicted of two serious felonies (§ 1170.12).

He was sentenced to three consecutive indeterminate terms of 25 years to life on Counts 2, 3, and 5 consecutive to a determinate term of 11 years for certain enhancements. Sentence on Count 4 was stayed. He was credited with 396 days served in jail prior to sentencing --- 264 days of actual custody, and 132 days of presentence conduct credits (§§ 2900, 4019).

On appeal, the court concluded Thomas was subject to section 2933.1's 15% limitation on presentence conduct credits (PRCC), not § 4019's 50%. The court remanded for resolution of certain other unrelated sentencing issues. Petitions for rehearing were denied. The Supreme Court granted Thomas' petition for review.

Thomas argued that he was entitled to PRCC of 50% based on the provisions of Pen.Code § 4019. Section 4019 originally limited both PRCC and post sentence conduct credits (POCC) to 50% of the total sentence. The Attorney General (AG) argued that the three strike law, Pen.Code § 1170.12 provided that both PRCC and POCC changed the limit to 20%. Secondly, the AG argued that in the case of serious or violent offenders, Pen.Code § 2933.1 mandates that PRCC and POCC be limited to 15%.

First, the Supreme Court found the three strike law only addressed POCC

and made no provision for reducing PRCC. Section 1170.12(a)(5) provides, "The total amount of credits awarded pursuant to Article 2.5 (commencing with section 2930) of Chapter 7 of Title 1 of Part 3 shall not exceed one-fifth of the total term of imprisonment imposed and shall not accrue until the defendant is physically placed in the state prison." By those terms, the court found, § 1170.12(a)(5) does not address PRCC for those defendants sentenced under the three strikes law. *People v Hill* 37 Cal.App.4th 220,225 (1995).

Second, the Supreme Court found Pen.Code § 2933.1 limits PRCC and POCC to 15% of the total sentence only for current offenders in the three strike scenario that are serious or violent. The court found that none of Thomas' current offenses are violent within the meaning of statutory definitions so § 2933.1 is not applicable in his case.

Another argument raised by the AG was that section 1170.12(a)(5) refers to both PRCC and POCC because section 2933.1, which expressly addresses both types of credits, was enacted over one month prior to the passage of section 1170.12. The court found the AG's argument to fail because section 2933.1 does not "award" credits within the meaning of section 1170.12(a)(5); it sanctions violent crime by limiting pre- and post-sentence credits available under other sections. Moreover, the court found, Proposition 184 provides, "All references to existing statutes are to statutes as they existed on June 30, 1993." (Ballot Pamp., text of Prop. 184, Gen.Elec. (Nov. 8, 1994) p.65; § 667, subd.(h.) Thus, to the extent section 2933.1, which was enacted in 1994, awarded credits, it was inapplicable to three strike cases.

The AG's final argument was that section 2933.1 was applicable to Thomas' case because the three indeterminate life terms imposed on the jury's three strike conduct finding converted his non-violent current offenses into violent offenses within the meaning of § 2933.1. Section 2933.1, subd.(a) provides, "Notwithstanding any other law, any person who is convicted of a felony offense listed in Section 667.5 shall accrue no

more than 15% of worktime credit, as defined in Section 2933." Section 2933.1, subd.(c), provides "Notwithstanding Section 4019 or any other provision of law, "for any person specified in subd.(a)," the maximum PRCC that may be earned is 15%.

The court examined § 667.5 subd.(c), and found it lists 19 circumstances that qualify as a "violent felony." At issue here is § 667.5(c)(7) which provides "Any felony punishable by death or imprisonment in the state prison for life." The court determined that none of Thomas' current offenses are punishable individually by imprisonment for life but only by the collective conduct under the three strikes law. The court concluded, "section 2933.1 and 667.5(c)(7) limit a defendant's presentence conduct credit to a maximum of 15 % only when the defendant's current conviction is itself punishable by life imprisonment, not when it is so punishable solely due to his status as a recidivist." See *People v Thomas*, (unpublished opinion) Super.Ct. No. TA036711 (12/6/99). ■

### \$8,000 Awarded in NY Chair Collapse

On November 24, 1999, the New York court of claims awarded \$8,000 in damages to New York prisoner Troy Benjamin. In 1995 while Benjamin was a prisoner at the Collins Correctional Facility, the back of the chair he was sitting in fell off, causing him to fall backwards, separate his shoulder and require the use of an immobilizer for several weeks.

The court ruled in Benjamin's favor, finding the defendant prison system had exclusive control of the chair, and accidents of this type do not happen absent negligence. The court awarded Benjamin \$8,000 in damages for past pain and suffering and loss of quality of life. Benjamin litigated the case pro se. See: *Benjamin v. State of New York*, Claim No. 93569. NY Court of Claims, Buffalo. ■

Source: *NY Jury Verdict Reporter*

## Right to Counsel Violated by Intrusive Guards

A federal district court ruled that a criminal defendant's right to counsel was violated by the refusal of guards to allow unmonitored communication between him and his attorney.

On January 26, 1990 David Lakin and four other prisoners abducted two guards while attempting escape from the State Prison of Southern Michigan. The would-be escapees shoved the guards into a state vehicle and raced away from the prison, with Lakin at the wheel. They were captured without incident after a short chase.

Five months later, to the day, a jury convicted Lakin and his cohorts of kidnapping, prison escape, assault of a prison employee and unlawfully driving away an automobile. Lakin was hit with sentences totalling approximately 35-65 years, all to run consecutive to his prior conviction.

Before the commencement of trial, Lakin repeatedly expressed concerns to the court (mostly through letters) regarding his inability to confer privately with counsel. Lakin told the court that two armed guards stood in the room where he met with his court-appointed attorney. When Lakin asked the attorney to instruct the guards to stand outside the room, the attorney refused. Lakin also complained in letters to the court that his lawyer refused to accept phone calls, answer letters, or meet with him to discuss the upcoming trial.

A week before trial, during an evidentiary hearing, Lakin requested replacement of counsel, citing the fact that whenever he met with the attorney there were, at a minimum, two guards present in the room. The court denied the request for new counsel and Lakin then chose to proceed pro se.

The Michigan courts denied Lakin's appeals. In May 1996 he filed a habeas petition alleging a Sixth Amendment violation of his right to counsel. In its ruling the district court discussed the standard of review under the AEDPA before turning to the issue of denial of counsel. The court ruled in Lakin's favor.

"According to the record," noted the court, "during [discussions with coun-

sel], Mr. Lakin was chained to the chair and handcuffed. To suppose that the attorney felt threatened is merely speculation .... If the attorney were in fear and required guards, then he should have withdrawn as counsel, because he would not be an effective advocate .... The failure to provide counsel, who would confer privately with Mr. Lakin requires habeas relief."

The court concluded that: "Mr. Lakin did not waive his right to counsel. He proceeded pro se, not because he made a decision between counsel and no counsel. He was not given the option to have counsel. He was faced with a Hobson's choice of either proceeding with an attorney only in name, but not in relationship or representing himself. Such a predicament violates the constitution's guarantee to be represented by counsel."

The court ordered Lakin's escape-related convictions vacated "unless the state takes action to afford [Lakin] a new trial within 90 days of this opinion..." See: *Lakin v. Stine*, 44 F.Supp.2d 897 (E.D. Mich. 1999). ■

### AL DOC Settles PLN Gift Subscription Lawsuit

On March 29, 2000, the Alabama Department of Corrections (DOC) settled a lawsuit filed by Prison Legal News and Alabama prisoner Aven Cotton. The Alabama DOC had previously required its prisoners to purchase books, magazines and newspaper subscriptions using funds from their prison trust fund accounts.

Gift books and subscriptions were censored at those prisons choosing to apply the policy (while the policy was statewide it was applied haphazardly) on the grounds that the prisoner did not purchase the items from their prison trust account. *PLN* was censored on this basis.

On May 13, 1999, *PLN* and Cotton filed suit claiming that the ban

on gift subscriptions and books violated their First amendment right to free speech. The suit was later amended to include a claim by *PLN* that its due process rights were violated by the fact that it was never notified of the censorship, the reason for the censorship nor given an opportunity to appeal the matter.

Under the terms of the settlement, the Alabama DOC agree to amend Administrative Regulation 303 to allow prisoners to receive free and gift publications sent by vendors and publishers. The AR was also amended so that the publisher/sender of censored publications is provided with notice of the censorship and an opportunity to administratively appeal the matter.

The complaint had only sought injunctive and declaratory relief. The plaintiffs' attorneys agreed to waive the fees and costs in the case. Thus, no damages were awarded. The settlement is enforceable in state court as a contract should the Alabama DOC not abide by it. The plaintiffs in this case were represented by Catherine Smith and Rhonda Brownstein of the Southern poverty Law Center in Montgomery, Alabama. The settlement came while the parties' cross motions for summary judgment were pending before the court. See *PLN v. Raley*, US DC, MD AL, Case No. 99-D-486-N

*PLN* has also litigated a ban on gift subscript publications against the Washington state DOC. *Humanists of Washington v. Lehman* was settled with the Washington DOC agreeing not to censor publications on the basis of who paid for it. [*PLN*, March, 2000]. The only published ruling on this issue, *Crofton v. Roe*, 170 F.3d 157 (9th Cir. 1999) [*PLN*, July, 1999], struck down as unconstitutional the Washington DOC's ban on gift subscriptions. Virginia, Minnesota and Kansas have enacted similar policies but to date, as far as we know, *PLN* has not been affected. If any readers have their subscription to *PLN* censored on this basis, please let us know. ■

## One Dead, Thirty-one Hospitalized In TX Prison Riot

A riot in a west Texas state prison Tuesday, April 25, 2000, has left one prisoner dead and thirty-one injured severely enough to require hospitalization according to National Public Radio. The riot, which had racial overtones, began in the dining facility of the 1,300-man minimum/medium-security Smith Unit while the evening meal was being served when a black prisoner began fondling himself while looking at a female guard. A Hispanic prisoner took offense and a fight ensued.

The fight in the dining facility was limited to the two participants. However, word of the altercation spread throughout the unit and several small fights later escalated into a riot in which over three hundred black and Hispanic prisoners, some of them armed with garden tools, met and fought on the yard. Guards fled the area and the fight went on for another five hours until the deployment of approximately three hundred guards and massive quantities of "a substance similar to pepper spray" dispersed the prisoners early the next morning. The prison's kitchen was gutted by fire during the night.

Fernando Trejo, 20, was killed by a blow from a pick ax taken from a utility closet inside the prison which is located about 60 miles south of Amarillo. Several of the thirty-one hospitalized prisoners are listed as critical. No guards were injured in the melee.

This is the largest disturbance ever in a Texas prison. It was also the second Texas prison disturbance in a week. On April 24, eight prisoners attacked three guards at the Connally Unit near San Antonio. Two Guards received minor injuries.

On April 14, a prisoner took a female guard hostage at the Clements Unit in Amarillo. The guard was released without injury.

Texas Department of Criminal Justice Executive Director Wayne Scott discounted any link between any of the above-reported incidents and each other or the other recent disturbances in Texas prisons. "In each case you must look for the underlying causes, and we always do. But in so many instances you will find no common thread beyond the fact that it happens in a prison setting," said Scott. He also stated that the Texas prison

guard shortage did not contribute to the riot or any of the other incidents. ■

Sources: *National Public Radio--Morning Edition, All Things Considered, San Antonio Express-News*

## Jail Discrimination Violates Equal Protection

The Court of Appeals for the Eighth Circuit held that different treatment of similarly situated prisoners because of their race, states an equal protection claim.

In 1998, Ricky L. Powells, a black prisoner, filed three separate lawsuits alleging that several defendants violated his rights during his incarceration at the Minnehaha County Jail. The actions were consolidated and dismissed pursuant to §§ 1915(e)(2)(B)(ii) and 1915A(b)(1) for failure to state a claim. Subsequently, Powells filed two more complaints, which were dismissed under the "three strikes" rule when Powells failed to pay the filing fees. On appeal, the court affirmed in part and reversed and remanded in part.

In one of his initial complaints Powells alleged, inter alia, that guard #084 granted his white cellmate's request for an extra blanket and mattress while denying his request, even though they both followed the same procedure; that although he and another prisoner participated in the same conduct, guard Farinol, for racially discriminatory reasons, singled him out for placement in segregation; and, that guards Mison and Forrester opened his legal mail out of his presence.

The appeals court held that the first two allegations were of different treatment of similarly situated persons and thus stated a claim under the equal protection clause. The court also held that the opening of legal mail when the prisoner is not present states a (unidentified but presumably first amendment) constitutional claim. With regard to these issues, the court reversed and remanded with instructions. With regard to all remaining claims, the court affirmed. Finally, because the court reinstated one of Powells' complaints, that action eliminated one of the "three strikes" that was the basis of the dismissal of the latter filed cases. Therefore, the court ordered those cases reinstated. See: *Powells v Minnehaha County Sheriff Dept.*, 198 F.3d 711 (8th Cir.1999). ■

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## News in Brief

**CT:** On June 1, 2000, a mattress fire at the Northern Correctional Institution, a control unit in Somers that includes the state's death row, left three prisoners and four guards injured. The guards were treated for smoke inhalation, one prisoner suffered burns and two others were treated for smoke inhalation. Fifty prisoners in the One East housing unit were temporarily moved to a different section of the prison.

**Nicaragua:** On May 30, 2000, the legislature granted amnesty to 110 of the country's 300 women prisoners to celebrate mother's day. Congressman Nelson Artola said: "We gave them their freedom because most were pushed toward crime by poverty and unemployment."

**Brazil:** On May 13, 2000, eight men armed with pistols and machine guns stormed a Sao Paulo jail and freed 144 prisoners. One policeman was shot in the legs and a guard was shot in the head during the attack. Police said the only prisoners who were not freed in the attack were eight in the jail's segregation unit. 19 prisoners were recaptured shortly afterwards.

**TX:** On May 31, 2000, Robert Earl Carter, 34, a former Texas state prison guard, was executed in Huntsville. Carter was convicted in 1992 of murdering six people, including his 4 year old son Jason Davis, an adult and four other children aged 5, 6, 9 and 16. Carter committed the murders because he was upset his ex wife would seek child support for Jason.

**NJ:** On May 18, 2000, the state DOC settled a federal discrimination suit filed by Sunni Muslim prison guards who challenged the DOC's ban on beards. Under the settlement, guards with religious exemptions for growing a beard no longer need to receive third party certification of their religious beliefs.

**FL:** On May 6, 2000, Colombia Correctional Institute prisoner Raymond Wigley, 39, was beaten and strangled to death. Prisoner John Blackwelder, 45, told prison guards he had killed Wigley and led them to the body. No reason was given for the murder.

**OR:** On May 20, 2000, Matthew Thompson, a prisoner on death row, was convicted of spitting phlegm on a prison guard's face while being transferred to disciplinary segregation from death row. Thompson was convicted of felony assault by Marion

County judge Albin Norblad who sentenced Thompson to 25 months imprisonment, to be served after he is executed. District attorney Stephen Dingle said "By prosecuting everybody, including a death row inmate, it will act as a deterrent to inmates who are serving lesser sentences."

**VA:** On April 11, 2000, Richmond jail guard Alvin Blake, 27, was sentenced to two years in prison after being convicted of bringing heroin and marijuana into the jail and distributing it to prisoners.

**AL:** Citing staffing shortages, the Alabama Department of Corrections banned all live media interviews with prisoners in late May, 2000. DOC commissioner Michael Haley claimed media visits were consuming large amounts of staff time. When asked, Haley could not cite how many media interview requests the department actually receives.

**Italy:** In April, 2000, mafia leader Vincenzo Curcio escaped from the Turette maximum security prison in Turin. Curcio was convicted of committing one murder and arranging seven others. Curcio used dental floss to cut through the bars of his cell, climb down bedsheets to the ground floor of the prison and then climb over the prison fence to freedom. The prison's bars are made from ductile iron, which has no carbon, which makes it very soft and easy to cut. Prison officials said that when the prison was built in the 1970's they were more concerned with guerrillas attacking the prison from the outside than prisoners escaping from the inside.

**Iran:** In April, 2000, the government pardoned 25,000 parolees that had already served their sentences and commuted the sentences of another 27,000 prisoners. The move is unprecedented in the history of the Islamic Republic, whose prison policies have been characterized by brutality and repression, including mass executions. The amnesties were granted by supreme religious leader Ayatollah Ali Khamenei, to celebrate various religious and national holidays.

**TX:** On February 22, 2000, Wilton Wallace, 46, was sentenced to four years in prison after being convicted in federal court of beating Missouri prisoner Toby Hawthorne. The attack took place in the privately operated Brazoria county jail. Hawthorne's beating and that of other prisoners was televised nationally. The incident has been extensively reported in past issues of *PLN*.

**FL:** In May, 2000, two wildfires forced the two day evacuation of 1,450 prisoners in the Everglades Correctional Institution. No one was injured by the fires, nor was the prison damaged.

**WA:** The Department of Corrections assigned a team of 12 employees who worked for six months to devise "The best way to pick up a ringing phone." DOC manager Cynthia Good said the DOC has suffered from "a kind of negative image" with "customers" and is trying to improve its public relations facade. Among the 18 recommendations the team made for DOC employees who answer telephones are: answer the phone by the third ring, employees identifying themselves, taking complete messages and responding to phone calls within 24 hours.

**Argentina:** In May, 2000, the government fired numerous high ranking prison officials after an investigation showed guards allowed prisoners out of the prison on robbing excursions and that prisoners ran a chop shop dismantling stolen cars for parts inside the prisons vocational training area with assistance from prison officials. One federal judge who investigated prison corruption was dismayed to learn prison officials had offered a prisoner early release if he killed the judge. In addition, guards at the prison were often drunk or absent from their posts and regularly smuggled contraband into the prison.

**TX:** Death row prisoner Michael Toney attempted to auction off five seats to his execution by putting the seats up for bid on internet auction house eBay. The posting was later removed by eBay. Texas prison officials say they wouldn't have allowed any buyers to attend Toney's execution.

**TX:** On June 9, 2000, Juan Soria, 33, a death row prisoner in Huntsville, attacked William Westbrook, 78, a volunteer chaplain at the prison. Soria pulled Westbrook's arm into his cell, tied a sheet around it and slashed it with a razor blade. Westbrook had surgery to repair the cuts to his wrist.

**OH:** In 1999, the Ohio Department of Rehabilitation and Correction (DORC) spent \$20.8 million on staff overtime. Bart Martelli, a nurse at the Orient Correctional Institution earned a base salary of \$52,463 plus \$61,854 in overtime pay. Ohio's highest paid state employee in 1999 was Jeko Nedelkoff, a psychiatrist at the Oakwood Correctional Facility in Lima who was paid \$208,539.

**WA:** In March, 2000, the state of Washington was hit with a \$17.8 million verdict in a suit filed by three developmentally disabled adults who were physically and sexually abused by caregivers in a state run group home. The verdict is the largest ever against the state of Washington and one of the largest personal injury verdicts in state history. On June 15, 2000, it was discovered that the state attorney general's office had failed to file the notice of appeal to appeal the verdict. The screw up has raised a firestorm of controversy as media and politicians alike sought explanations for the blunder. Attorney General Christine Gregoire defended the competence of her office, but noted she had hired outside counsel to prosecute the appeal, if a court allows it.

**NJ:** On May 8, 2000, Morris county jail guard Michael Nowacki, 48, was arrested on charges of attempting to lure an 11 year old girl into his car by offering her a flower.

**Russia:** On May 26, 2000, the Russian legislature approved an amnesty for 120,000 minor offenders, about 10% of the nation's prison population. Designed to relieve prison crowding, the amnesty marks the 55th anniversary of the Soviet Union's defeat of Nazi Germany. The amnesty applies to all prisoners who have tuberculosis, are war veterans, disabled, over 55, pregnant women and juveniles.

**WA:** On June 1, 2000, the Stafford Creek Correction Center in Aberdeen was locked down after 130 prisoners refused to return to their cells. The pris-

oners were protesting the lack of gym, library and job facilities at the prison, which opened April 7. The protest lasted three hours and ended without violence by prison officials. Ten "ring-leaders" were rounded up and sent to the Intensive Management Unit in Shelton.

**Brazil:** On June 6, 2000, 1,500 prisoners at the Piraquara prison in Curitiba rioted to demand the release of 20 prisoners from segregation; that their sentences be reduced and that various prison employees who neglect prisoners and abusive prison guards be fired. The entire prison was largely destroyed during the uprising. One prisoner died of a heart attack and one guard was seriously injured when he jumped from a 15 meter roof to flee rioters. The rioting ended, and 12 prison employee hostages were released unharmed, when prison officials agreed to the prisoners' demands.

**Israel:** On May 31, 2000, over 500 Palestinian prisoners ended a monthlong liquid only hungerstrike after prison officials agreed to allow more family visits, to release five prisoners from isolation, to allow higher education in prisons and to allow prisoners to make phone calls home for special occasions such as weddings and funerals. Hundreds of protesters and demonstrators outside the prisons supported the prisoners' struggle. A key demand by the prisoners, which was met, was that young children be allowed barrier free visits with their imprisoned parents.

**WI:** On April 19, 2000, David Hatch, 35, a prisoner at the Racine Correctional Institution in Sturtevant hanged himself to avoid being sent to the state's "supermax" prison in Boscobel.

**PA:** On June 2, 2000, former Pittsburgh district justice Gigi Sullivan pleaded guilty to a federal misdemeanor for shoplifting a pair of jeans, a watch, hair dye and other sundries from the PX on McGuire air force base in New Jersey. Sullivan had already pleaded guilty to shoplifting charges in Pennsylvania for the theft of clothing from a department store. Sullivan faces state charges stemming from her use of cocaine and heroin in her chambers before court proceedings and for protecting drug dealer Donald Geraci. ■

## OH Prisons Change Birthing Policy

In January, 2000, the Ohio Department of Rehabilitation and corrections (DORC), announced it would change its policies for pregnant prisoners at the Franklin Pre-Release Center in Columbus, Ohio, which houses the state's pregnant prisoners. The policy change is a result of a lawsuit filed in 1999 by Sean Turner, who asked to see his wife Barbara Ann Turner, give birth to their child. A federal court issued an unpublished ruling allowing Turner to witness the birth of his daughter at the Ohio State University Hospital.

The policy change prompted by Turner's lawsuit is to allow a "birthing support person," the child's father or other loved one, to be present and help the pregnant prisoner give birth. DORC director Reginald Wilkinson also said an Ohio prison nursery is being planned for the women's prison in Marysville. Breast pumps for lactating mothers will no longer be considered "security risks."

Wilkinson told the media: "Anything we can do to prevent persons from future criminal behavior is our mission, and strengthening the family is one of the most powerful rehabilitative things we can do." Wilkinson did not say why, if that was indeed the case, it took losing a federal lawsuit to implement the policy change. ■

Source: *Akron Beacon Journal, Columbus Dispatch*

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## Escape Costs Private Transport Company

A private prisoner transport company agreed to pay \$50,000 to the state of North Dakota to defray the state's expenses for recapturing a prisoner who spent three months as a fugitive after escaping from one of its buses.

Convicted child killer Kyle Bell was being transported from North Dakota to Oregon by TransCor America, Inc. when he escaped October 13, 1999, while the transport bus was refueling at Santa Rosa, New Mexico. TransCor guards failed to notice his absence for nine hours.

Bell was recaptured January 9, 2000 after authorities received a tip from a Dallas couple about his whereabouts. The couple collected a \$50,000 reward posted by the state for information leading to Bell's recapture.

The settlement which TransCor paid May 31, 2000, is less than half the \$102,127 the state billed the company in January. That bill includes the \$50,000 reward as well as the salaries of nine state employees involved in the search for Bell.

TransCor (a subsidiary of Corrections Corporation of America) initially offered to cover \$10,000 of the \$50,000 reward. Attorney General Heidi Heitkamp threatened to sue the company if the full \$102,127 bill was not paid.

North Dakota Gov. Ed Schafer said the settlement was "reasonable and fair." But the Attorney General, who wasn't consulted by the governor's office about the settlement, was critical of the low amount. TransCor's vice president David Tucker Jr. said the settlement was "good news."

A spokesperson from the governor's office said TransCor carries a \$50 million liability insurance policy to cover escapes. But that policy requires the company to pay the first \$100,000 of any claim.

A settlement with North Dakota doesn't end TransCor's legal battles over Bell's escape. In March, the family of Bell's victim sued TransCor in North Dakota district court for more than \$50,000 for negligence and inflicting emotional distress. ■

Source: *Bismark Herald*

# Legal News

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## The Restraint Chair: Safe and Humane?

*by Anne-Marie Cusac*

Jail and prison employees call it the "strap-o-lounger," the "barcalounger," the "we care chair," and the "be sweet chair." Prisoners and their lawyers have other names for the device: "torture chair," "slave chair," and "devil's chair." They are not referring to the electric chair, but to a restraining device that has led to many serious abuses, including torture and death. Belts and cuffs prevent the prisoner's legs, arms, and torso from moving. The restraint chair is designed for violent prisoners who pose an immediate threat to themselves or others.

But according to interviews with prisoners, lawyers, and restraint chair manufacturers, as well as a review of court cases, jail videotapes, coroners' reports, and scattered news stories, it is clear that the restraint chair is being used in an improper-and sometimes sadistic-manner:

- children have been strapped into the chairs for nonviolent behaviors;
- nude prisoners and detainees have been strapped into restraint chairs;
- prisoners have been left in restraint chairs for as long as eight days. In some cases, the jail staff failed to manipulate the prisoner's limbs to protect against blood clots;
- prisoners have been required to testify while in restraint chairs;
- prisoners have been interrogated while in restraint chairs;
- prisoners have been injured while in restraint chairs;
- prisoners have been tortured by being hooded, pepper-gassed, beaten, or threatened with electrocution while in the chairs;
- At least eleven people have died under questionable circumstances after being strapped into a restraint chair.

Use of the restraint chair is widespread: jails, state and federal prisons, the Immigration and Naturalization Service, the U.S. Marshals Service, state mental hospitals, juvenile detention centers, and foreign governments are all equipped with the chair.

Amnesty International has called for a federal inquiry into use of the restraint chair. The device "is an issue of great concern to

us," says Angela Wright, an Amnesty researcher on the United States. "It appears to be used in some jurisdictions as a front-line or even routine form of control, including as a punishment for disruptive or annoying behavior."

Michael Valent, a mentally ill prisoner, died after spending sixteen hours nude in a restraint chair in a Utah prison in March 1997. The deputy chief medical examiner, Edward Leis, confirmed that Valent's prolonged restraint "is the main precipitating factor leading to blood clots and his death." A lawsuit brought by Valent's mother ended in a \$200,000 settlement with the state of Utah. Although it was not a stipulation of the lawsuit, the state stopped using the restraint chair. [PLN, Aug. 1997]

Scott Norberg died in June 1996 of what the Maricopa County Medical Examiners Office called "accidental positional asphyxia" after he was pushed into a restraint chair, his head forced to his chest, shocked with a stun gun, and gagged. Maricopa County and its insurance carrier settled a wrongful death lawsuit with Norberg's family for \$8.25 million in 1998. [PLN, Feb. 2000]

Katalin Zentai, a former journalist, died in late 1996 at the Connecticut Valley Hospital, according to an excellent piece of reporting that appeared in the *Hartford Courant* in October 1998. For thirty-three of the final thirty-six hours of her life, Zentai was strapped in a restraint chair. She died, after being released from the chair, as the result of blood clots that had formed in her legs and traveled to her lungs.

## Inside

Deviant Prison Doctors	7
PLN Sues Nevada DOP	9
WA and IN Phone Rate Suits	10
Pro Se Tips and Tactics	11
The Ride: Rise of the NLR	13
Organizing in Georgia	16
Prison Physician Liable	18
WA Civil Commitment Fines	20
Parole Comm. Retaliation	21
EAJA Fee Awards	22
Bush's Compassion	24
News in Brief	26
No Immunity for ETS Exposure	28

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## Restraint Chair (cont.)

On April 17, 1995, Carmelo Marrero died in the Sacramento County Jail while strapped in a restraint chair. The County Coroner's Office said his death was an accident. Officially, his death was listed as the result of "probable acute cardiac arrhythmia, due to probable hypoxemia, due to combined restraint asphyxia and severe physical exertion, due to apparent manic psychotic episode." As Supervising Deputy Coroner Phil Ehlert explained to the *Sacramento Bee*, hypoxemia is "a lack of oxygen caused by a highly agitated state exacerbated by imposed restraint." A class-action lawsuit against the jail, which was eventually settled for \$750,000, claimed that the device had repeatedly been used for torture at the jail and that Marrero's death was a direct result of his time in the restraint chair.

Demetrius Brown, a twenty-year-old, mentally ill man, died in Jacksonville, Florida, on October 31, 1999, after a guard used a choke hold while others attempted to strap him into a restraining chair. "The manner of the death," concluded the medical examiner's report, "is homicidal."

In early December 1996, twenty-two-year-old Anderson Tate was arrested after a routine traffic stop and taken to the St. Lucie County Jail in Florida. He informed the jail personnel that he had swallowed a large amount of cocaine. He was denied medical care and "died while strapped in a restraint chair," reported Amnesty International in 1998. As Tate died, "he was in the chair for three hours, moaning and chanting prayers, while jailers taunted him and ignored his pleas for help. Two deputies were dismissed after an administrative investigation by the Sheriff's Department, but no criminal charges were filed." The incident was recorded by a video camera.

On March 5, 1997, Daniel Sagers died in an Osceola County, Florida, jail after guards placed him in a restraint chair and beat him, using a towel to force his head back so violently that they damaged his brain stem. Sagers was being held at the jail for firing a shotgun while on a golf range. His family eventually won a \$2.2 million civil lawsuit. In February 1999, a former guard was convicted of manslaughter in Sagers' death and sentenced to one year in jail. He has filed an appeal. Two other guards pleaded no contest to charges of battery

and were placed on probation. [*PLN*, Oct. 1999]

On December 20, 1994, Shedrick Brown died after struggling with guards while being forced into a restraint chair in the Hillsborough County Jail in Tampa, Florida. After four hours in the chair, he was found unresponsive, having suffered a stroke. He died an hour later. In March 1995, the Hillsborough County Medical Examiner's Office ruled his death a homicide.

On August 30, 1997, Anthony R. Goins died in a Kansas City, Missouri, jail of cardiac arrest after struggling with guards who squirted him with pepper spray and strapped him in a restraint chair. When the officers returned a few minutes later from washing the spray off themselves and planning to clean up Goins, they found him dead. The coroner said that the drug PCP and Goins's struggle with the police were contributing factors in his death.

In December 1998, Kenneth Vincent Bishop died at the Pueblo County Jail in Colorado shortly after being placed in a restraint chair. Although the Pueblo County coroner ruled that his death resulted from an excessive level of amphetamines, the sheriff has denied the ACLU's open-records request of the video of Bishop's treatment. According to Mark Silverstein, legal director of the American Civil Liberties Union of Colorado, the sheriff has also refused to hand over the jail's restraint policy.

On the night of July 6, 1999, James Earl Livingston was having a psychotic episode. He wrongly believed his brother-in-law was chasing him and trying to kill him. Livingston, a thirty-one-year-old man with schizophrenia from Tarrant County, Texas, ran to the police for protection. In about eight hours, half of that time spent in a restraint chair, Livingston was dead.

The Tarrant County Medical Examiner's Office ruled last August that Livingston's was a natural death caused by bronchial pneumonia. But that's not the whole truth, says Richard Haskell, a lawyer who is representing Livingston's mother, Maxine Jackson, in a suit against the Tarrant County Sheriff's Department. He says Livingston's last stint in the chair killed him. "So far as we know, he was pepper-sprayed in the face and then placed in a restraint chair," says Haskell. Livingston was not allowed to wash the pepper spray out of his eyes and off his face in apparent violation of Tarrant County

Sheriff's Department procedures, says Haskell. "He was not decontaminated, and he was left alone in a room. Within twenty minutes he was dead."

Pepper spray "inflames the mucous membranes, causing closing of the eyes, coughing, gagging, shortness of breath, and an acute burning sensation on the skin and inside the nose and mouth," said Amnesty International in a 1998 report on human rights abuses in the United States. "There is considerable concern about its health risks."

**Dan Corcoran is president of AEDEC International Inc., of Beaverton, Oregon, which manufactures the popular Prostraint Violent Prisoner Chair. Corcoran says his chair is "humane" and was designed to be so. "You know, when you take a little bird and it's lost and confused, and at first its heart is beating?" he asks. But if you fully cup that bird in your hands and immobilize it, the bird, he says, "calms down."**

Deputy Mark Lane Smith was the first person to perform artificial respiration on Livingston in an unsuccessful attempt to revive him. When another deputy took over, wrote Smith in a Detention Bureau Report, "I then removed myself from the area and walked into the sally-port, where I threw up from inhaling pepper gas residue from inmate Livingston."

It's hard to imagine the terror someone feels who is buckled into a restraint chair after being pepper-sprayed, says Haskell. "You wouldn't do that to a dog."

The chair that held James Earl Livingston for more than four hours, on and off, on the night of July 6, 1999, is manufactured by KLK, Inc., of Phoenix, Arizona. The KLK chair sells for \$2,290, plus a \$190 crating charge. This "Violent Person Restraint Chair" (the company's name for the device) "has been in use by the sixth largest sheriff's office jail system in the nation for four (4) years, with a ninety (90%) percent reduction in injuries compared to the previous four (4) years," brags the company advertising. "Special sizes and colors available upon request."

I telephone KLK. Teresa Dominguez, a production coordinator with the company, tells me the chair is sold mainly to prisons and mental hospitals but says she can give me no other information. On her advice, I submit a fax of questions for the company's officers. After more than a week without a response, I call back.

"They basically said they can't answer the questions," says Dominguez. "The owner saw the fax and said, 'No, we won't answer these.'"

The company also declined to answer questions about the death of James Earl Livingston. But Dominguez says the chair isn't to blame. "How they use the chair, I imagine, would be the question," she says.

Another manufacturer is more forthcoming. Dan Corcoran is president of AEDEC International Inc., of Beaverton, Oregon, which manufactures the popular Prostraint Violent Prisoner Chair. Corcoran says his chair is "humane" and was designed to be so. "You know, when you take a little bird and it's lost and confused, and at first its heart is beating?" he asks. But if you fully cup that bird in your hands and immobilize it, the bird, he says, "calms down." So, too, says Corcoran, with human beings. The chair "makes a real nice sit for them."

What about allegations that the restraint chair has been linked to several deaths and that it is easily misused? "The people who want to do good start gain-saying it, calling it a medieval instrument of torture," says Corcoran, who "has no patience" with this stance. "It's a way of getting attention."

When I ask Corcoran for a press packet, he tells me he doesn't have one "because every lawyer who doesn't have a job" will want to get hold of the press packet and take his words out of context. He will, however, tell me the chair's cost--"\$900 bucks. If you get the accessories, \$1,300." He will also tell me who his customers are--"mostly county jails," but also state prison systems, the U.S. Bureau of Prisons, the U.S. Immigration and Naturalization Service, the U.S. Marshals Service, and the Forest Service. "Park Service, too," he says. "Every state, every province has it."

Corcoran also exports his restraint chairs, but "only to the countries that really believe in human rights," he says. "A lot of countries are looking into this right now. We're kind of ticklish about selling

them to Third World countries that don't have human rights because there really is a possibility that they might be abused." But, he says, you can use anything for torture.

Among those countries that have gotten Corcoran's OK and now have AEDEC restraint chairs is the United Arab Emirates. According to Amnesty International reports on the United Arab Emirates, "Cruel, inhuman, and degrading punishments, including flogging and amputation, were repeatedly imposed" in 1999. In 1998, "Torture and ill-treatment were reported and the use of cruel judicial punishments increased significantly." In 1997, said the human rights group, "Torture and ill-treatment of detainees in police custody continued."

Corcoran says he has sold "thousands" of the chairs. But as to the exact number, "We don't tell anybody that, in court or otherwise."

A flier for the chair recommends its use for "interrogating prisoners and for detaining people in Holding Tanks in Mass Entertainment Facilities (Concert Halls, Collisions [sic], etc.)." It appears to be used primarily in the intake and booking sections of local jails. Many of those who end up in the chair have not been convicted of a crime and have landed in jail for minor offenses, such as public drunkenness.

"The mere presence of the restraint chair is asking for abuse," says Charles T. Magarahan, an Atlanta attorney. On June 5, 1997, Magarahan's client, Christopher Stone, was beaten, strapped into a restraint chair, and then beaten again after he was arrested for drunk driving and brought to the Cherokee County Jail. "He had not been uncooperative," says Magarahan. "He kept saying, 'I'm with you guys.' They put him in the chair-but they didn't push it like you'd push a chair. They dragged him by his head, with him screaming in pain."

"When Plaintiff was in the holding cell, totally restrained, Defendant [Deputy Sheriff Donald] Ware returned to the outside of the cell and sprayed pepper spray underneath the door," says the legal complaint that Stone filed against Ware, Cherokee County, and two other jail employees (the suit is currently in court). No one bothered to decontaminate Stone. Then, once the cloud of gas subsided, says the complaint, Deputy Ware returned and sprayed under the door again.

## Restraint Chair (cont.)

In a separate suit, Ware was also prosecuted for using excessive force against Stone. On November 4, 1999, he pleaded guilty. He was sentenced to one year probation and fined \$1,000. He has also been dismissed from his position.

In February 1999, the Sacramento Sheriff's Department settled a class-action lawsuit alleging that deputies were torturing people, many of them women and minorities, with a restraint chair. The cost of the settlement was \$755,000, the largest ever for alleged officer misconduct in the department's history. The lawyers who brought that suit are demanding that the restraint chair be banned.

The Sacramento case alleged numerous and repeated forms of torture, including mock executions, where guards strapped inmates into a Prostraint chair and told them they were about to be electrocuted. Katherine Martin, a 106-pound woman with a heart condition, claimed she spent eight and a half hours in the chair after she was wrongly accused of touching a guard. She alleged that the straps had been pulled so tight that they had sliced skin from her back and shoulders and cut off circulation to her extremities and that she suffered permanent nerve damage. She also claimed that she was given no liquids and that she was taunted and mocked. She was denied her requests to use the bathroom and ended up urinating on herself. Martin had originally been brought into the jail on suspicion of public drunkenness. This charge was later dismissed.

Videotapes of the Sacramento Jail's restraining methods played an important role in the case. In one tape, Ronald Motz calls through the window of his cell, asking for his lawyer. "Motz, this is the last time we're going to tell you, sit down," says a police officer, "Your attorney's not here, and the phone doesn't work." Motz continues to call out. After a break in the tape, guards wrap a spit mask around his face and pull him into a chair. "I just want to call my attorney," says Motz. "You don't get to call an attorney," says the officer. "Why?" asks Motz. The officer tells him that he can't make the call because he was "drunk in public." A few seconds later, the guard says, "You were going to be released in about five hours. Now you're not."

"What did I do wrong—ask for my attorney?" asks Motz.

"You weren't following directions," says the guard.

The videotapes also show a woman named Gena Domogio being put into the chair naked. She yells at the guards who are kneeling on her back and spits blood on the floor, apparently because her mouth has been injured. The guards respond by wrapping her face in a towel. They keep the towel on her face and at one point appear to hold it against her mouth as they force her into the chair, although she repeatedly says that she has a thyroid problem and that she can't breathe.

Kimberly Byrd was reportedly taken to the hospital after she passed out in the chair where she had been hooded and tightly bound, according to a letter Amnesty International wrote to the Sacramento County Sheriff's Department in March 1999. In the videotape of her restraint, she is obviously terrified. "I'm going to die. Please don't let me die," she says over and over again.

The Sacramento case, *Geovanny D. Lobdell vs. County of Sacramento et al.*, listed AEDEC International, Inc., as a defendant. AEDEC's Corcoran gave a deposition on June 8, 1998, to attorney Stewart Katz. Many of Katz's questions referred to a "Manufacturer's Warning" sheet Corcoran distributes to his clients: "The purpose of the Prostraint Chair is to provide law enforcement and correctional officers with the safest, most humane, and least psychologically traumatizing system for restraining violent, out-of-control prisoners," reads the statement of purpose included on the warning. "The chair is not meant to be an instrument of punishment and should not be used as such."

Here are selections from Corcoran's deposition:

Q: What testing did you do?

A: I put various friends in there. I yanked on that as hard as I could, and I'm physically apt. I could cause no pain to them whatsoever.

Q: Now, does your manufacturer's warning make any reference to minimum age constraints for persons to be restrained in the restraint chair?

A: That does not.

Q: And does it refer to any maximum age constraints for people to be placed in the restraint chair?

A: No, it does not.

Q: Does it convey any warning as to whether individuals with specific health problems should not be placed in the restraint chair?

A: No.

Q: Well, are there any physical conditions that you believe should lead to a person not being restrained in the chair?

A: No arms, no legs.

Q: All right. So you don't believe the chair should properly be used on amputees or people born without fully developed limbs.

A: The chair wouldn't be functional unless they had appendages.

Q: Is it a fair statement that it's your opinion that the chair is less psychologically traumatizing than the alternatives you mentioned [these included, in Corcoran's words, "four-pointing, chained to a bench, strapped to a bed"]?

A: Yes.

Q: Is that opinion based upon any medical or psychological expert work in the field?

A: No.

Q: Now [your statement of purpose states]: "It is an especially useful tool for restraining drug or alcohol affected prisoners." Period. My question, sir, what is your evidence for believing that it is especially useful for people who are on drugs?

A: Because medical restraints at that time are very dangerous.

Q: And what is the basis for saying the medical restraint at that point is dangerous?

A: Because they have not diagnosed what is in their bloodstream already, and whatever is put in there is compounded.

Q: Was there any scientific literature you relied on to come to this conclusion?

A: That's common sense.

Q: Did you do any testing on people who were under the influence of drugs or narcotics?

A: No.

Q: Did you do any testing for people who are under the influence or feeling the effects of alcohol?

A: No.

Q: All right. Now, the last statement under your "Statement of Purpose": "The chair is not meant to be an instrument of punishment and should not be used as such." Why did you include that sentence?

A: Because Mexico asked to purchase 200 of them, and I wouldn't sell them to Mexico.

Q: And why wouldn't you sell them to Mexico?

A: As any instrument, car, toilet plunger, they can all be abused. There was too high a potential without—we have a high, much higher standard in this country than other countries do. That's why the chair does work here and people will buy it.

Q: People go to the bathroom while they are seated in the chair. Are there provisions in the design of the chair to evacuate those excretions?

A: Yes.

Q: What are those?

A: Not to evacuate but contain.

Q: What are those?

A: The thing is cupped. Blood-borne pathogens and bodily fluids are contained in the person's clothes. I felt that was a better choice than let the pathogens go into the cell and infect other people.

Q: Have you looked at any of the literature regarding how long a person can safely be restrained in a Prostraint Chair?

A: There is no literature that I know of.

Q: Have you done any studies, research, as to the maximum amount of time an individual can be restrained in your restraining chair without causing a physical injury?

A: No.

Q: Now, if you thought the chair wasn't punishing, why wouldn't you sell those chairs to Mexico?

A: Because I have seen enough movies, and I may be stereotyping, but there could be interrogations. I didn't want that to happen.

Q: Is it a correct statement that you marketed the Prostraint restraining chair for use which includes interrogating prisoners?

A: Yes.

Q: Do you know if any customers purchased ten restraint Prostraint chairs?

A: Yes.

Q: And has anyone purchased ten?

A: Yes, or more than ten.

Q: What entity would that have been?

A: I think both the states of Florida and the state of Georgia for the juvenile division. They require it."

Efforts are now under way to restrict or ban use of the chair. This past August, a Knox County, Tennessee, judge ruled that the confession of robbery suspect E. B.

"Boyd" Collier was involuntary and illegal because it came while he was confined in a restraining chair during his five-hour interrogation. "While such a chair may be useful, it easily crosses the line as a coercive force," wrote Criminal Court Judge Mary Beth Leibowitz.

A March 1996 Department of Justice investigation of the Maricopa County Jails in Arizona found that the sheriff's department used stun guns on prisoners while they were confined in restraint chairs, including one case where jail staff used a stun gun against a prisoner's testicles. According to Amnesty International, one prisoner, Richard Post, was forced into a restraint chair in a manner that is "reported to have caused compression of his spine and nerve damage to his spinal cord and neck, resulting in significant loss of upper body mobility." On August 19, 1999, Maricopa County agreed to pay Post \$800,000 to settle his claims that jail guards had used excessive force against him. In 1997, jail officials told Amnesty International that the jail system owned sixteen chairs and that it had used them about 600 times in the past six months. The Maricopa County Jails have since altered their restraint policy and no longer use the chairs for punishment. A Department of Justice lawsuit against the jail system was dropped in June 1998. [PLN, Aug. 2000]

Alleged misuse of the restraint chair led the U.S. Department of Justice to file a 1996 lawsuit against Iberia Parish Jail in Louisiana, claiming that the jail deputies, as a matter of course, subjected prisoners to "cruel and unusual punishment and physical and mental torture" by confining them to restraint chairs for hours and forcing them to sit in their own excrement. One prisoner was allegedly held in the chair for eight days, another for forty-three hours. In a pretrial settlement, the jail authorities agreed to stop using the restraint chair.

In early January of this year, a group of Erie County, Pennsylvania, prisoners asked a federal judge to ban use of the chair. Their suit against the prison, which is still pending, says that prisoners have been held for two to eight hours in the chair for such behaviors as "making insolent remarks," cursing, and throwing towels at one another.

In Ventura County, California, a class action lawsuit led a federal judge to issue a preliminary injunction banning the chair on November 15, 1999. That order is being

appealed. The lawsuit alleged that during one eighteen-month period, 377 people had been strapped into the chair at the Ventura County Jail and that one prisoner had been left in the chair for thirty-two hours. "Data shows that the Sheriff's Department's misuse of that chair flows from a practice of restraining nonviolent arrestees for extended periods of time in violation of the arrestees' Fourteenth Amendment rights," wrote U.S. District Judge Lourdes Baird in her fifty-page decision. "The policy allows deputies to require restrained arrestees to either urinate or defecate on themselves and be forced to sit in their own feces or 'hold it.'"

On December 13, 1999, Amnesty International issued a statement calling for an inquiry into police actions at the WTO protests in Seattle. Among the allegations that troubled Amnesty were several incidents involving restraint chairs at the King County Jail. "People were allegedly strapped into four-point chairs as punishment for nonviolent resistance or asking for their lawyers," says the group's press release. "In one case a man was stripped naked before being strapped into the chair."

Martin Mijal, a building contractor in Portland, Oregon, participated in the WTO protests. He was arrested with other Direct Action Network protesters and charged with "failure to disperse." After ten hours of waiting in several jails, and hearing that a lawyer was on her way, the group decided to resist the deputies' attempts to transfer them to individual cells. According to Mijal, they linked arms. Mijal says the deputies responded by bringing in several restraint chairs. They then began to separate the protesters. "I was holding myself in a ball with my arms locked under my legs," writes Mijal in his complaint to the ACLU of Washington. "As they carried me, I cried out 'Lawyer!' three times because I was very scared and I thought they might be close by."

Mijal says he did not resist as the guards placed him in the restraint chair. In fact, he wrote in his ACLU statement, "I asked the guards if they were OK since they had to carry me and it must have been awkward. They said 'yes' they were. Then, as I remained entirely incapacitated in the wheelchair, and totally by surprise a male guard put pepper foam directly into my eyes. It was very, very painful. Instinctually, to get the foam out of my eyes, I wiped my forehead against the nearest

## Restraint Chair (cont.)

thing, which was a guard's leg, who was standing to the side of me and I heard him yelp when the chemical burned through his pants."

Mijal's action seems to have angered the guard. "Then he took a cloth and put it over my face," he writes in his ACLU complaint. "Then he put his hand on the cloth and with his finger found my left eye socket and rubbed the poison in my eye, forcing my eyelid up. Then he lifted the cloth and put another pad of thick cloth over my mouth and gagged me. I couldn't breathe at all, because of the pain and the fear. I was in immense agony."

"We would dispute that account," says Jim Harms, Public Information Officer for the King County Department of Adult and Juvenile Detention. He claims that the deputies were simply following procedures and that the activists shouldn't have expected to see their lawyer so quickly upon arriving at the jail. He also says that the officers used a standard use-of-force progression on Mijal, that he struggled with the guards and refused to be restrained, and that he was pepper-sprayed just so the deputies could get him into the chair. As for being pepper-sprayed while restrained, hooded, poked in the eye, and gagged, "there is nothing in the report or the follow-up review to show that actually happened," says Harms.

"If you've ever seen the film *Brazil*, it's like a scene from the torture chamber," says Robert Smith of San Francisco. Smith, an activist with Art and Revolution in San Francisco, was arrested along with Mijal and backs up his claims. "He's being held down, he's got a bag over his face, there's people in riot gear all around him. This is after being pepper sprayed. I'd never seen human beings doing something like that to other human beings." ■

*Anne-Marie Cusac is Managing Editor of The Progressive. This article was made possible in part by the Fund for Investigative Journalism, Inc.*

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## Prison Realty/CCA Bailout Deal Canceled

On the cover of the July PLN we reported that the nation's largest private prison owner and operator, Prison Realty/CCA, verged on bankruptcy and that one of its principal shareholders, Pacific Life Insurance Co., planned to infuse a \$200 million equity investment into the ailing company. When the July PLN when to press the deal had been agreed to but not yet finalized. Just days later the deal fell through.

On June 30, Prison Realty announced that the deal had been "mutually terminated." For its part, Pacific Life was dissatisfied over key conditions that Prison Realty failed to meet. Pacific Life wanted Prison Realty to obtain a four-year extension on its bank credit and settle pending lawsuits for an amount not higher than the company's insurance coverage. Instead, Prison Realty arranged with its bank lenders to extend their credit line 18 months, and failed to resolve pending lawsuits.

The deal with its bankers also allowed Prison Realty to borrow \$55 million to meet immediate funding needs. That, and a \$760 million 10-year contract with the Bureau of Prisons to operate two federal prisons, gave Prison Realty management the confidence to restructure the company without outside help.

Wall Street analyst Robert Norfleet of Davenport & Co. said that terminating the Pacific Life deal sends a negative message to investors.

"A lot of people want to see them aligned with a strong financial partner," Norfleet told *The Tennessean* newspaper. The absence of a partner such as Pacific Life, which would have taken board seats and overseen a change in management, could create doubts about the future of the company.

Another Wall Street analyst dropped Prison Realty's share rating to "underperformed." Investors listened. The first full trading day after the Pacific Life deal was canceled saw Prison Realty's shares drop 9.3% to \$3.06 a share. Three days later the price slid further, to \$2.81, and three weeks later slipped to \$2.38/share.

Money manager David Dreman, whose New Jersey-based Dreman Value Management LLC owns 11.3% of out-

standing Prison Realty common stock, expressed outrage over the company's treatment of shareholders.

"It's a management that puts the shareholder's interests last," he told *The Tennessean*. Dreman says he favors a complete overhaul of Prison Realty's board. "These directors guided this company from disaster to disaster over the last few years."

On Prison Realty going it alone with the restructuring, Dreman said: "We don't view it favorably. We would prefer the involvement of outside professionals who know what they are doing."

Among the many lawsuits pending against Prison Realty is a breach of contract suit filed June 9, 2000 in the U.S. District Court for the Southern District of New York by Prison Acquisition Company LLC. Prison Acquisition is a limited liability company formed by affiliates of The Blackstone Group, Fortress Investment Group, and Bank of America, to carry out a proposed \$350 million bailout of Prison Realty/CCA. As reported in the July PLN article, the Prison Acquisition agreement allowed for competing restructuring offers provided that Prison Acquisition could exercise its right to match the offer. When Pacific Life put forth its \$200 million restructuring plan, Prison Acquisition declined to exercise its right to match the terms of the Pacific Life deal.

However, Prison Realty was "obligated to pay Prison Acquisition a termination fee of \$7.5 million and a transaction fee of \$15.7 million, and to reimburse prison Acquisition for out-of-pocket costs and expense incurred in connection with the Agreement... whether or not the [\$350 million bailout] transaction was consummated," according to the lawsuit.

The same day that it declined to match the Pacific Life offer, Prison Acquisition requested payment of \$24,053,502 from Prison Realty. According to the lawsuit Prison Realty, although it has publicly acknowledged in company press releases that it owed the \$24 million obligation to Prison Acquisition, has failed to honor repeated demands for payment. ■

Sources: *The Tennessean*, Bloomberg Press, Reader Mail

## Deviant Doctors Dumped on Prisoners

How does a psychiatrist come by the "qualifications" required to work in a state prison? Not all prison doctors have questionable pedigrees, but the case of Dr. Valentino Andres is all too common.

According to a California prisoner and *PLN* subscriber, Dr. Andres is the Chief Psychiatrist of the infamous northern California supermax dungeon, Pelican Bay State Prison. He is also, in the words of this subscriber, "a convicted serial sexual predator." Pretty strong words. But *PLN* has obtained court documents that provide ample evidence to back them.

In 1992 Andres, who until then had operated a solo psychiatric practice, had his medical license suspended by the state medical board. This action was taken after Andres was convicted in Sutter County (CA) Municipal Court of "sexual exploitation by a psychotherapist."

Court records reveal that Andres indeed used his medical practice to prey upon patients (who are referred by initials only): Patient D.C. said that Andres had her "remove her clothing from the waist up so that [he] could check her heart rate."

Andres similarly violated patient H.O. by having her "remove her clothing so that [he] could check her heart rate, and by fondling [her] nipples under her bra."

K.P. testified that Andres instructed her to "disrobe so that he could check her heart rate and blood pressure... gave K.P. pelvic and vaginal exams and fondled her breasts... and would give K.P. injections of medication and would then engage [her] in acts of sexual intercourse." [presumably while unconscious, which would more accurately be described as "rape."]

Several other patients described essentially the same type of "therapy" whereby Andres had them disrobe and then would conduct breast and pelvic exams, and "sexual acts [which] included sexual intercourse, oral copulation and sodomy."

On two previous occasions Andres was tried on criminal charges of sexual misconduct, with both trials resulting in

hung juries. He was convicted, though, after police had one patient wear a hidden recording device to several of these "therapy" sessions.

In 1992, the state medical board determined that Andres's "conduct with the various complaining witnesses demonstrates that the violations are part of a pervasive pattern going back more than 15 years." The board then suspended his medical license.

Three years later, in November 1995, the board permanently revoked Andres's medical license. However, under the terms of a stipulated settlement, the revocation was stayed and the suspension lifted in December 1995, provided that Andres "enroll in a course in Ethics... [and] undergo a psychiatric evaluation." The order further stipulated that Andres be prohibited from engaging in a solo practice, not be allowed to practice medicine at all until found to be "mentally fit to practice safely" and prohibited from examining or treating female patients without a third party present."

As previously reported in *PLN*, the California prison mental health system has been repeatedly found to be unconstitutionally deficient. Underfunding and staffing are endemic problems. Doctors like Valentino Andres are the answer.

Another case in point is Dr. Stanley Dratler, currently employed by the Florida DOC. In 1986 Dratler had his license suspended for three years for "exercising influence within a patient-physician relationship for purposes of engaging a patient in sexual activity."

Court documents obtained by *PLN* reveal that Dratler engaged in a lengthy pattern of sordid and bizarre victimization of patients of his Dade County gynecological practice.

One patient testified that after complaining of back pain, Dratler conducted a complete pelvic exam and "told [her] she needed to know how to masturbate and not rely solely on her husband. During this examination, conducted in an examining room containing only [the patient] and Respondent [Dratler], Respondent masturbated [the patient] and had her masturbate herself. When [she] asked about her back, [Dratler] told her there was nothing wrong with her back."

Another patient, this one only 16 years old, testified that when she visited Dratler complaining of a vaginal rash, he questioned her at great length about her sexual history. She admitted that she had been sexually active since age 12 but had never experienced orgasm. Dratler then "performed what he described as a psycho-sexual examination on [the 16-year-old patient] during which he massaged her breasts; stimulated areas outside the vagina with a cotton swab, and inserted fingers in [her] vagina." This patient testified that during three subsequent office visits Dratler "fondled her breasts while masturbating her."

Another patient described being subjected to a "psycho-sexual examination," even though she had come to Dratler's office only for a pap smear. She said that Dratler "started to masturbate her and told her she needed to have more orgasms."

Dratler's former secretary and medical assistant, Patricia Cherry, testified that he asked her "if she would teach some of his patients to masturbate themselves. Cherry was told by [Dratler] that he was conducting a survey on human sexuality and each patient would be a part of that survey." She also testified about an incident when Dratler administered Sodium Pentothal intravenously to a female patient while the patient was "undressed from the waist down. After the [Sodium Pentothal] IV started, the patient became unconscious on two occasions. During one period while the patient was awake, [Dratler] asked the patient what she thought about oral sex. During one period when the patient was unconscious [Dratler] asked Cherry if she would sexually stimulate the patient. Cherry said no."

The Florida state medical board cited a total of 27 counts of sexual misconduct involving six patients plus the employee when recommending that his medical license be suspended.

Dr. David Thomas, the man in charge of Florida's prison doctors, told the *St. Petersburg Times* that the 51-year-old Dratler's "problem with women" was easily solved; since joining the department, Dratler has worked only at prisons for men.

The Florida Board of Medicine again disciplined Dratler in 1994, while he

## Deviant Doctors, (cont.)

was employed by the FDOC, this time for violating a condition of his medical license that required he be supervised at all times by another physician. Dratler, who also has a medical malpractice claims history, unsuccessfully appealed the decision and was put on probation for five years -- and continued working for the Florida DOC.

Florida's state prison system, like California and most states, suffers from chronic shortages of both funding and staff. And doctors like Dratler who have faced state medical board discipline increasingly fit the bill -- especially considering that most hospitals are reluctant to expose themselves to lawsuits stemming from hiring doctors with tainted pasts. These same doctors present little liability risk to state prison systems because prisoners rarely sue under medical malpractice statutes. And the tainted doctors come cheap, typically earning \$70,000 to \$85,000 a year -- compared with the \$120,000 the average doctor makes right out of medical school.

According to Dale Austin, deputy executive vice president of the Federation of State Medical Boards of the United States, less than half of 1 percent of the nation's doctors were disciplined in the last year. Fully 11 percent of doctors working for the Florida DOC have disciplinary records. ■

Sources: Reader Mail, Court Documents, *St. Petersburg Times*

### Correction

In the June, 2000, issue of *PLN* the article *The New Bedlam*, incorrectly stated that the California Department of Corrections had 3,200 mentally ill prisoners in its custody. Between 10 to 15 percent of the CDC's prisoner population suffers from a serious mental illness that requires treatment. In June, 2000, the CDC stated that approximately 19,000 of the prisoners in its custody were receiving mental health treatment. We would like to thank Steven Fama, an attorney with the Prison Law Office, for bringing the error to our attention.

## Former Political Prisoner Settles Suit for \$4.5 Million

On April 26, 2000, the city of Los Angeles, California and the federal government agreed to pay former political prisoner Geronimo Ji Jaga (formerly known as Elmer Pratt) \$4.5 million to settle a wrongful imprisonment suit he had filed. Ji Jaga is a former member of the Black Panther Party who was framed for murdering a Santa Monica school teacher. Ji Jaga spent 27 years in California prisons before having his conviction reversed in 1997 when a judge found prosecutors had lied about a key witness against Ji Jaga being a police informant.

Shortly after his release from prison, Ji Jaga filed suit against the city of Los Angeles and the federal government alleging that they knowingly framed him for a crime they knew he did not commit because the FBI had him under surveillance at a Black Panther meeting in Oakland when the murder took place. The suit was filed on Ji Jaga's behalf by the ACLU of Southern California, Johnie Cochran and Stuart Hanlon. Cochran and Hanlon represented Ji Jaga in

his 27 years of criminal litigation that eventually led to his release.

The federal government agreed to pay Ji Jaga \$1.75 million, and the city of Los Angeles paid \$2.75 million. Ji Jaga's attorneys had threatened a trial that would focus not only on his prosecution but the broader pattern of police harassment of the Black Panther Party and later cover-ups. It would also implicate local and federal law enforcement officials that are still employed in police work. Mark Rosenbaum, ACLU legal director, said, "It wasn't just a story of the past. It was a story of three decades of cover-up, and we made it clear that we were going to litigate that, and that it would implicate current officials. Nobody wanted that trial."

Ji Jaga currently lives in Morgantown, Louisiana. Stuart Hanlon, Ji Jaga's lawyer since 1974, said about the case, "It doesn't prove that justice works. To me, if it takes 27 years and this kind of legal struggle to get someone out, it doesn't prove anything about justice." ■

Source: *New York Times*

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## FIRE MOUNTAIN GEMS

**1/6 PAGE AD**

# Penis Stomping Guard Loses Appeal

In the July '99 issue of *PLN* we reported the conviction of former Orleans County Jail (Albion, NY) Lieutenant John Walsh on three counts of violating the civil rights of jail detainee Norvin Fowlks. Walsh was alleged to have tormented and abused Fowlks, who was described as mentally disturbed, and stomped on Fowlks' penis on numerous occasions.

Walsh appealed his conviction claiming that (among other issues raised) the evidence presented at his trial "failed to demonstrate that: (1) his alleged actions constituted 'punishment' prohibited by the Eighth or Fourteenth Amendments; (2) he caused injury of constitutional dimensions; or (3) he was acting under 'color of law' at the time of the alleged incidents."

Walsh was convicted in large part on the testimony of fellow jail guard Joseph Kujawa (along with testimony by two other guards and two jail detainees). Kujawa, who witnessed several incidents of Walsh

assaulting Fowlks, said he initially failed to report the abuse because he feared retaliation. He would have had to report the abuse to Walsh's superior, the warden. Kujawa testified that Walsh and the warden were buddies and that he had frequently observed the warden taunting the mentally disturbed Fowlks alongside Walsh.

Some of Kujawa's testimony is summarized in the appellate court record: "Kujawa heard Fowlks shout repeatedly, 'Big Jack, give me a cigarette.' Walsh, who was six feet, two inches tall and weighed over 300 pounds, walked to the front of Fowlks' cell and said, '[A]ll right Norvin, you know what you got to do, on your knees.' Fowlks, who was naked inside the cell, dropped to his knees. Walsh then said, '[O]kay, put your dick on the bars,' and Fowlks placed his penis on a horizontal steel plate of the bars. Walsh then grabbed two vertical cell bars with his hands, raised his right foot, and placed it on Fowlks' penis for a few seconds, as if he were climbing

a ladder. Fowlks screamed and '[h]is mouth was wide open, his eyes were almost, you know, bugging out of his head, you could [see] the white all [the] way around his eyes.' Fowlks' scream was 'as loud or louder' than the screams Kujawa had heard at the scenes of motor vehicle accidents he had investigated. Walsh then gave Fowlks a cigarette."

The Second Circuit ruled against Walsh on all issues raised on appeal and affirmed the judgement of the district court, which had sentenced Walsh to 24 months on each of the three counts (to be served concurrently) as well as a two year term of supervised release and a \$150 special assessment.

For a more complete account of the lurid and graphic details of additional instances of Lt. "Big Jack" (aka "Hammer Jack") Walsh's penis stomping escapades, see: *U.S. v. Walsh*, 194 F.3d 37 (2nd Cir. 1999). ■

## PLN Sues Nevada DOP

On June 11, 2000, *PLN* filed suit against the Nevada Department of Prisons for censoring *PLN* at all Nevada prisons. Beginning in September, 1999, Nevada prison officials have banned *PLN* from all Nevada prisons claiming that "inmate correspondence" and "inmate newsletters" are not allowed.

Efforts by *PLN* and several of *PLN*'s prisoner subscribers to resolve the matter were unsuccessful. Nevada prison director Robert Bayer refused to address *PLN*'s concerns about the blanket censorship, referring us to assistant attorney general Keith Munro, who was also dismissive of *PLN*'s concerns. Not only is *PLN*, the magazine, banned in all Nevada prisons, so are all other mailings from *PLN*, including letters about the censorship, subscription renewals, book orders, etc. The censorship was apparently ordered by John Slansky, assistant director of the Nevada DOP.

The lawsuit, filed in federal court in Reno, claims that the blanket ban on *PLN* violates *PLN*'s First Amendment right to free speech and Fourteenth Amendment right to due process of law. The censorship has been occurring with no notice or reason for the censorship and no opportu-

nity for the parties to administratively appeal. The lawsuit seeks declaratory, injunctive and monetary relief. The plaintiffs are *PLN* and *PLN*'s publisher, Rollin Wright. The defendants are Jackie Crawford, director of the Nevada DOP, John Slansky, assistant director of the DOP, and Robert Bayer, the DOP's former director.

*PLN* requested a preliminary injunction from the court to ensure delivery of *PLN* to Nevada prisoners while the litigation is pending. Since the Nevada DOP banned *PLN* in September, 1999, the number of Nevada prisoners subscribing to *PLN* has dropped from 21 to 1. On August 15, 2000, the preliminary injunction was granted.

*PLN* is represented in this litigation by ACLU cooperating attorney Donald Evans of Reno, and David Fathi, of the ACLU's National Prison Project in Washington D.C. The filing of the suit was accompanied by a press conference held by the ACLU of Nevada. The press conference received extensive local publicity with most Nevada papers reporting it. At least two dailies also ran editorials supporting *PLN*'s position on the matter.

See: *PLN v. Crawford*, USDC D NV, Case No. CV-N-00-0373-HDM-RAM. ■

## PLRA Guide Available

*The Prison Litigation Reform Act: A Guide for Prisoners*, by John Boston, was previously reviewed in the November, 1999, issue of *PLN*. The booklet is now being distributed by the National Prison Project. The 32 page booklet contains a comprehensive discussion of all provisions of the PLRA and the court rulings interpreting it. The Guide is an invaluable reference to anyone involved in prison and jail litigation. Copies of the PLRA Guide are now available for \$2 for prisoners; \$30 for non prisoners, from:

National Prison Project  
1875 Connecticut Ave. N.W.  
Suite 410  
Washington, D.C. 20009  
(202) 234-4830.

## WA and IN Prison Phone Rates Challenged

On June 20, 2000, a class action suit was filed in King county (Seattle) superior court in Washington. The suit claims that various phone companies that have contracted with the Washington Department of Corrections to provide collect call services for Washington prisoners have violated RCW 80.36.520 and RCW 19.86.090, of the Washington Consumer Protection Act.

The complaint states that people receiving in state long distance calls from Washington prisoners are not informed of the rates they are being charged for the call. People residing in other states who receive long distance collect calls from Washington prisoners were not afforded an opportunity to learn the rates they were being charged prior to November 1, 1999, when the Federal Communications Commission mandated disclosure of the rates. This lack of rate notification violates RCW 80.36.520 which requires that phone companies inform consumers of the rate they are being charged for phone services. Violations of the statute are actionable in state court with damages presumed as the cost of service, plus \$200 per violation (i.e., per call). RCW 19.86.090 allows for civil suits that seek triple damages, injunctions and attorney fees for violations of the state Consumer Protection Act.

The class representative plaintiffs are Sandy Judd and Zuraya Wright, a Washington and Florida resident, respectively, who receive long distance collect calls from Washington prisoners. The defendants, who have exclusive contracts with the Washington DOC to provide collect call phone services to prisoners are: American Telephone and Telegraph, GTE Northwest, Centurytel Telephone Utilities, Northwest Telecommunications, U.S. West and T-Netix. In 1998 these companies gave the Washington DOC 45% of their gross billed revenue from prisoner collect calls, totalling approximately \$5.2 million. The rates charged to consumers accepting collect calls from Washington prisoners have steadily increased in recent years, as have the kickbacks received by the Washington DOC.

As relief, the plaintiff class seeks an injunction requiring disclosure of the rates charged for collect calls from Washington state prisoners; money damages, including the statutorily presumed damages of cost of service, plus \$200 per violation and triple damages of up to \$10,000 per class member;

an entry of judgment in favor of the class members and an award of attorney fees and costs. The plaintiff class is represented by Chris Youtz, Jon Meier and Marie Gryphon of the Seattle law firm Sirianni and Youtz. See: *Judd v. ATT*, King County Superior Court No. 00-217565-5SEA.

On June 16, 2000, a class action suit was filed in Marion county superior court in Indianapolis, Indiana, challenging the phone rates charged to consumers accepting collect calls from prisoners in the Indiana DOC and the Marion county jail. The 39 named class representative plaintiffs are consumers in Indiana and other states, and includes attorneys, who have accepted collect calls from Indiana and Marion county jail prisoners and have been charged excessive rates for the calls. The defendants are Marion county sheriff Jack Cottey and Betty Cockrum, commissioner of the Indiana Department of Administration.

The state of Indiana and Marion county have entered into exclusive contracts with ATT to provide exclusive collect call phone services to its prisoners. In exchange for the phone service monopoly, ATT pays the state of Indiana 53% of gross billed revenues, with \$9.5 million being paid upfront. Marion county receives 40% of ATT's gross billed revenues for calls from its prisoners.

The plaintiff's suit claims the defendants have violated their common law right to reasonable phone rates. The defendants are accused of the unauthorized taxing of money, unauthorized imposition of a licensing fee, imposing an unreasonable and unjust service charge; unjust enrichment; money had and received; unlawfully restraining and restricting trade; unlawfully increasing the price of phone service and denying the plaintiffs equal term participation in phone services. The plaintiffs claim these actions violate Indiana Code (IC) 1-2-23; 5-7-2-1; 36-1-2-23; 36-1-3-8; 24-1-2-1 and 8-1-2-4.

The plaintiffs are seeking declaratory and injunctive relief, money damages and attorney fees and costs. The plaintiff class is represented by Indianapolis attorneys Lawrence Reuben and Stephen Laudig. See: *Alexander v. Cottey*, Marion County Superior Court No. 49C010006CT001217.

PLN will report developments in both cases. To obtain a copy of the complaints in either of these cases send \$5 per complaint to PLN's Seattle office and specify what it is for.

## HOLOBIRD AD

### (1/3 PAGE)

# Pro Se Tips and Tactics

## Supreme Court on Kind and Quality of Appellate Counsel

by John Midgley

In three recent decisions, the U.S. Supreme Court addressed the kind and quality of representation to which people are entitled on appeal of their criminal convictions. If your conviction is on appeal (or should have been appealed but was not), you need to know about these cases and how you might take steps to address problems they present.

### 1. *Anders* procedure no longer required.

In *Anders v. California*, 386 U.S. 738, 744 (1967) and other cases, the Supreme Court held that before an attorney appointed to conduct a criminal appeal could withdraw claiming the appeal was frivolous, the attorney must draft and file a brief “referring to anything in the record that might arguably support the appeal” and send the brief to the convicted person so that they could submit additional argument. This year, in *Smith v. Robbins*, 120 S.Ct. 746 (2000), a bare five-person majority of the Court approved a California procedure that does not require counsel to “refer to anything in the record that might arguably support an appeal.” The California procedure permits counsel who thinks a case is frivolous to merely summarize for the appellate court the procedural and factual history of the case, and leaves to the convicted person and the court the job of looking for arguable error in the record. The Supreme Court majority decided that this procedure adequately protects the right of the convicted person to a fair appeal, and found that an “*Anders* brief” identifying potential issues is not constitutionally required.

Justice Souter pointed out for the four dissenting Justices that elimination of the *Anders* brief deprives the convicted person of something crucial to the fairness of the appeal, the convicted person’s own counsel’s identification of points that might arguably support an appeal:

A simple statement by counsel that an appeal has no merit, coupled with an appellate court’s endorsement of counsel’s conclusion, gives no affirmative indication that anyone has sought out the appellant’s best arguments or championed his cause to the degree contemplated by the adversary system.

To guard against the possibility... that counsel has not done the advocate’s work of looking hard for potential issues, there must be some prod to find any reclusive merit in an ostensibly unpromising case and some process to assess the lawyer’s efforts after the fact. A judicial process that renders constitutional error invisible is, after all, itself an affront to the Constitution. 120 S.Ct. at 769.

### 2. No right to self-representation on appeal.

In *Martinez v. Court of Appeal of California*, 120 S.Ct. 684 (2000), the Court held that, unlike at trial, a defendant has no right to represent him- or herself on appeal. Criminal defendants have a limited right to represent themselves at trial if they validly waive the right to counsel. *Faretta v. California*, 422 U.S. 806 (1975). In *Martinez*, a nearly unanimous Court held that *Faretta* does not apply to appeals, and that the state may force on a convicted person a lawyer to conduct the appeal.

*Martinez* is of interest partly because Martinez himself claimed to be “a self-taught paralegal with 25 years’ experience at 12 different law firms.” 120 S.Ct. at 687. He represented himself at trial on grand theft and embezzlement charges and won an acquittal of the grand theft charge, but was convicted of embezzlement. Despite his experience in the law and his partial success as his own lawyer at trial, the California courts and then the U.S. Supreme Court denied his request to represent himself.

Notably, the Court did not say that convicted persons should never be allowed to represent themselves on appeal. The Court said only that the U.S. Constitution does not grant a right to self-representation, but left open other ways in which people can pursue self-representation: “Courts... may still exercise their discretion to allow a lay person to proceed *pro se*.” “Our holding... does not preclude the States from recognizing... a right [to self-representation on appeal] under their own constitutions.” 120 S.Ct. at 692.

### 3. Duties of trial counsel in assisting with filing appeal.

The third case, *Roe v. Flores-Ortega*, 120 S.Ct. 1029 (2000), dealt with what trial defense counsel must do to assist a convicted person in deciding whether to appeal. The Ninth Circuit had granted Roe’s habeas petition asking to reinstate his appeal because, under Ninth Circuit precedent, counsel’s failure to appeal without the defendant’s consent was automatically found to be ineffective assistance of counsel. The Supreme Court found that this automatic rule was not constitutionally required, and discussed when counsel must consult with a convicted person and file a notice of appeal.

The Court majority first noted that when a defendant asks counsel to appeal and counsel does not, that is always ineffective assistance. 120 S.Ct. at 1035. The Court then said that where there is no specific instruction from the convicted person, courts reviewing ineffective assistance claims could not presume that an appeal should have been filed, but must determine whether counsel consulted with the convicted person about an appeal. However, the Court refused to say that every failure of trial counsel to consult with a convicted person would be ineffective assistance:

We instead hold that counsel has a constitutionally-imposed duty to consult with the defendant about an appeal when there is reason to think either (1) that a rational defendant would want to appeal (for example, because there are nonfrivolous grounds for appeal), or (2) that this particular defendant reasonably demonstrated to counsel that he was interested in appealing. 120 S.Ct. 1029, at 1036.

The Court then stated that even though consultation was not always required under this standard, nevertheless in “the vast majority of cases” there will be a constitutional duty of counsel to consult with the defendant. 120 S.Ct. at 1037. Justice Souter, in a partly dissenting opinion, argued for a duty to consult in virtually all cases. He pointed out the obvious, that many convicted persons have little knowledge of what an appeal is or means, have difficulty with English, etc., and so are unlikely to be able to “demonstrate to counsel” an interest in appealing unless there is full consultation with counsel.

## Pro Se Tips (cont.)

### 4. Steps you can take.

*Smith* and *Martinez*, taken together, could cause tremendous problems in a case in which appellate counsel believes there are no arguable grounds for reversal. A convicted person could be saddled with a lawyer who (perhaps incorrectly) thinks there is no merit to the appeal, but at the same time the convicted person could be unable to assert a right to self-representation.

There are a few things you can do to try to lessen the impact of these decisions on your appeal. First, you should inform your appellate counsel in writing as soon as they are assigned to your case about any issues you think should be raised as part of the appeal. Many a convicted person has come up with issues that a lawyer (or the person proceeding *pro se*) has turned into a winning appeal.

Second, you should take advantage of any rules that allow you to file *pro se* materials even though you are represented by counsel. Many states' court rules provide this right in every criminal appeal. See *Martinez*, 120 S.Ct. at 692.

Third, if you do want to try to represent yourself, ask to do so. As noted above, appellate courts still have the discretion to let you represent yourself if you can show some ability to do so, or you may be able to make a claim that state law gives you the right to represent yourself. In some states, the right to appeal from a criminal conviction is a constitutional right (there is no such right in the United States Constitution), so you may be able to argue that you can represent yourself in exercising that right. See, for example, *State v. Sweet*, 581 P.2d 579 (Wash. 1978).

Do not undertake self-representation unless you have some legal experience and ability or some excellent help from someone who knows what they're doing. (Writ writers vary widely in their ability to actually help you; proceed with caution and beware of people who want to charge you a lot of money to work on your case. Writ writing, especially for money, may also violate prison rules.)

If you do decide to file *pro se* materials or you are allowed to represent yourself, do not waste the appellate court's time with disorganized filings or "issues" you want to raise that do not have any basis in the trial record. An appeal is normally based

only on what happened at trial, and you will not gain reversal of your conviction without a strong showing that your legal rights were violated at trial and that the violation impacted your conviction. Consult manuals showing how to brief issues on appeal and present your materials in a well-organized, succinct manner that makes clear what legal errors occurred at trial and how that hurt your defense.

*Roe* presents different issues about what you can do to protect your rights. If you did not have an appeal, but wanted to, *Roe* might help you get your right to appeal reinstated. In order to do this, you will have to show one of three things:

- 1) you asked your counsel to appeal, and they did not; or
- 2) you had nonfrivolous grounds for appeal and your counsel did not discuss the appeal with you; or
- 3) you "reasonably demonstrated" to your counsel that you were interested in appealing, and your counsel did not discuss the appeal with you.

Since you will be raising these issues in a post-conviction (habeas-type) proceeding, it will be your burden to prove that one of these things happened. The best evidence is written evidence: A letter or note from you (if you wrote one) to your lawyer asking about appealing, or a notation in the lawyer's file that you asked about an appeal or that there might be good issues for appeal.

Given that this kind of evidence is most likely to be found in your trial lawyer's file (unless you kept a copy of a note you wrote), it is crucial to ask for a copy of the lawyer's file at the earliest possible time. As a former client, you should be able to get a copy of most papers in your former lawyer's file. See ABA Model Rule of Professional Conduct 1.16(d), requiring that lawyers "surrender[] papers and property to which the client is entitled..."

*Roe* also seems to suggest, by emphasizing the need for the trial lawyer to talk with you if you have nonfrivolous grounds for appeal, that if you now are able to show that there were good grounds for appeal, you might be able to get relief. In other words, if you can now do legal research showing nonfrivolous grounds that the lawyer should have seen but did not, and can also show the lawyer did not talk with you about an appeal, you may be able to demonstrate ineffective assistance.

If you are seeking to reinstate your appeal, you may want to look to state law first. As noted above, in some states the right to appeal from a conviction of crime is a constitutional right, which might translate to a more favorable standard for reinstating appeals than is set out in *Roe*. See *State v. Sweet*, cited above.

Note that if you are thinking of trying to get your appeal reinstated through filing a habeas-type action in state court, perhaps followed by a federal habeas corpus petition, there are now strict time limits on federal habeas actions. 28 U.S.C. § 2244(d). Many states also have time limits on post-conviction actions. Check to see if you still have time and act quickly if you do.

The material in this column is not intended to be specific legal advice about your case. As always, you must do your own research based on the facts of your case.

[John Midgley is an attorney with Columbia Legal Services in Seattle, WA.]

# Kent Russell AD

# THE RIDE: Rise of the NLR

By W. Wisely

With virtually all confirmed members of the Aryan Brotherhood indefinitely sentenced to Pelican Bay's infamous SHU, a new group moved in to fill the void on California prison yards. The pace of stabbings, slashings, assaults, and race riots in maximum security, Level IV, prisons has increased. The world's largest and most costly gulag is proving to be fertile ground for the seed of one next-generation white supremacist prison gang. Officially sanctioned racism from segregated housing, assignment quotas, to barbering services, nurtured a new wave of angry white males. The Nazi Lowriders.

*July 29, 1999, about 8 in the morning. I'll write as long as I can. Guard told Southern Mexicans last night all cells to be searched today. Chicans, NLR will cell extract in protest. 15 to 20 guards, 4 sergeants, fire chief, several MTAs, maintenance men, lieutenants, and captains. Cloud of pepper spray spreads through block. Took twenty minutes to cut sheets tying first cell shut. Gassed two Southern Mexicans ten times, jerked door open. Six gooners, helmets, face shields, gas masks, bullet resistant vests, black leather gloves, steel toed paratrooper boots, knee and shin guards. Push big Plexiglas shield into cell, trampled almost unconscious prisoners. Beat, kicked men, flipped over, handcuffed behind backs, dragged out. One tried to walk. Other was limp.*

The Ride formed sometime in the 1980s in the California Youth Authority's Youth Training School in Ontario, California. Young white prisoners were getting raped, robbed, beat, and stabbed by black and Latino street gang members. The Nazi Lowriders was the white response. "We didn't get big in the pen until the mid-90s," said Demon, not his real nickname, a validated NLR member and "shotcaller" in charge of the white prisoners at Lancaster prison's segregation unit.

*Demon left keys by Rusty. They took Rusty and two other members by van to the hole two weeks ago. Late last night, kite addressed "to all whites" came around. "To all white warriors, we will fight to the end! Tie your doors shut, make*

*cups of piss and shit to throw on guards. Try to break back window of cell. Anyone who don't extract is through!" Prisoner who sent kite just got in. Why's he calling shots?*

The NLR has confused and frightened prison gang experts and law enforcement. It has no known structure, no constitution, no hierarchy. "We've got some Big Homies, but no one in particular leads the Ride," said Demon. "Some members have earned higher status and get more respect based on work they put in, so they got more juice. The structure is shaky, but it'll tighten up when we get to SHU," Demon said. There'll be housecleaning in the ranks, comeuppance for bad calls and scandalous moves. "Too much dope fiending going on," Demon smiled.

*Vents off. Tee Shirt over mouth, nose. Breathe in shallow gasps, lungs on fire, hard to stop coughing. Second cell. Two more Southern Mexicans.*

*Door wrenched open, gooners try to rush in, prisoners, wearing only boxer shorts, fight back, stopped guards. Out numbered, overpowered, unable to breathe, prisoners subdued, beaten, kicked, clubbed like baby seals. One dragged out to concrete yard, hog-tied with chains and shackles. Be there over twelve hours, no water, no toilet, legs, arms, wrists, and shoulders numb from pain. Steel restraints grate on bone after a few hours. Cellie brought back, put in cage. Gave up without fight, never walk mainline again without fear of assault.*

Sheriffs Lee Baca of Los Angeles County and Mike Carona of Orange County presented a report Thursday, August 19, 1999, by the Anti-Defamation League on the NLR, believed to be the fastest-growing white supremacist gang in the state, according to the *Los Angeles Times*. Believing the NLR a bigger problem in his jails than the Mexican Mafia, Baca said, "It's a menace we all have to attack." Known members are segregated in Orange and Los Angeles County jails after a series of attacks against blacks. Tom Leyden, a consultant for the Simon Wiesenthal Center in Los Angeles, and former neo-Nazi skinhead, said the NLR

is different because members use and sell drugs, primarily crank, while embracing racist philosophies such as the 14 Words and 86 Precepts.

*Short, fat, female gooner yelled, "Don't come out!" They want each cell to be a battle. They laugh. Third cell. Took almost an hour to cut elaborately braided ties holding the door shut. Door jerked open, two young skinheads, fought ferociously, backed extraction team off. When over, NLR and skins loudly cheered, rattled cell doors, shook whole building. Gooners went out of order, cleared cells each side of Demon's.*

At a quiet Mission Viejo video arcade in 1996, several purported Nazi Lowriders beat a 12 year-old Southern Mexican boy with a metal pipe. The attack was captured on film and broadcast by *Fox News* in a series about the resurgence of racist prison gangs. In July of 1999, after the news stories aired, Southern Mexican prisoners on Lancaster's B Facility received orders. "What happened on B Yard came from the [Pelican] Bay," said an older Southern Mexican who declined to be identified, but who participated in the melee. The riot involved more than 125 prisoners. Clumsy, another Latino prisoner, was shot through the back by a guard during the incident. "What's happening here is happening all over because of the shit that went on outside with the NLR jumping little Chicans," the older con said.

*Guards, maintenance, nurses, MTAs, and other staff ran out. Overcome by pepper spray although they wore gas masks. Just woke up on floor, bump on head. Guess I tried to stand up and fainted. Don't know how long I was out. It's dark now. Having trouble writing. Cell lights out, water turned off. Thirsty. Demon didn't want to extract. Guards fronted him off. Came to cell, yelled, "You coming out or not?" They knew. He had no choice. They gassed Demon's cell through the vent. Sergeant emptied one canister, got another, emptied that, too. Demon fought. His cellie unconscious. Gooners threw photos, Bible, and magazines on tier.*

The Ride allows no female members, but has quite a few groupies. Members and associates sport Nazi tattoos, Swastikas, portraits of Hitler, and SS lightning bolts like racist skinheads. In fact, the NLR recruits skins and forms loose alliances

## THE RIDE continued

with skinhead gangs in and out of prison. "There are sleepers on every prison yard and on the streets putting in work for the Ride until they can get in," said Elbert "Mad Dog" Vaught, a short, slender and thirty-something Three Striker from San Fernando Valley. Mad Dog's covered from head to toe with prison tattoos. The letters NLR are tattooed in four-inch high block letters across his Adam's apple. Since March, 1999, there's been a moratorium on admitting new members until the NLR settles its problems both within and without the ranks.

At first closely aligned with the Aryan Brotherhood, the two white gangs had a falling out. "Somewhere along the line the NLR clashed with the Brand and decided to be on our own and not do what they said. So, there's a conflict, a power struggle," Demon said. This struggle recently resulted in the stabbing of several NLR members housed at Palm Hall, a segregated housing unit inside the Southern Reception Center at Chino, California.

*Fire chief turned on exhaust fan. It's facing my cell. Pepper spray runs down smeared plastic covering cell door. At seventh cell, Spunky and Fatboy, Southern Mexicans, slammed against metal bunks and cell walls. Crowd of prison staff gawked like spectators at dog fight-only, this is six rottweilers against two blind Chihuahuas. Screaming, pounding, roar of gas generator for flood lights outside. This started after breakfast, it's after midnight now. I'm propped against cell door. MTA, "You all right?" Me, "No, I can't breathe, my eyelids are swollen, I've got a headache." "Can't give you anything. You have to put in a slip to see the doctor," she said walking away. "Why did you ask?" I whispered to the door. Chorus of coughing, sneezing, puking, mixed with grunts, bangs, curses. Don't know if I'll make it through this.*

"Stir, stir, stir it up!" yelled Bullet, freshly arrived to segregation from Lancaster's C Facility after slashing another prisoner's throat. The razor blade is the weapon of choice for whites, and stirring up trouble among their own

kind the recreation of the day. "Now that we're all going to the SHU," Demon said, "we'll be preying and stirring on ourselves." The Ride believe they're the enforcers for whites in jail and prison. Yet, although they call minorities "mud races," and glibly spew empty racist rhetoric adopted from their skinhead and neo-Nazi allies, Nazi Lowriders buy drugs from black and Latino prisoners, and even carry out hits on whites for minorities.

On Centinela's maximum security yard, newly arrived whites are told to show their "paperwork," the court judgment or probation report showing what they were convicted of, before they even make up their bunk. "I don't want to do it, but they'll stab me if I don't. I don't want no trouble," said Steve, a twenty-one year old sentenced to 25 years to life for simple assault. Steve paced nervously in his bare cell, no television, radio, or canteen. "We've been locked down since I got here three months ago. I haven't been able to make it to the canteen once," he apologized.

Steve explained the NLR control his county jail, and prisoners must show their booking papers before they are even allowed to enter a cell. Steve played guitar outside. When he talked about it, a thin smile fixed his face for a moment. "Every time they let us off lockdown, there's another stabbing and we go back on," Steve said. He asked to see the prison psychiatrist so he can get medication for depression, not because he thinks drugs will help. He knows he'll be transferred out of Centinela if he takes antidepressants.

Prisoners who've been in the system a long time, or those just coming out of segregation or the hole, don't have paperwork. They get slashed or stabbed anyway, usually by their cellies. If the cellie won't handle it, both of them get hit. It's mandatory for whites to wear shoes when going to and from the shower at Centinela. The prison has four facilities. One was recently converted to a Level IV, and has alternated between long lock-downs, and days or even hours of normal program since.

In July 1999, a sergeant was stabbed by prisoners. During the lockdown that followed, all prisoners were cell fed. Whenever they left their

cells, whether for showers or visits, they were strip searched, and handcuffed behind their backs. Twelve guards, brandishing pepper spray and batons, cautiously cracked cell doors one by one to hand food trays in. The designer forgot to include tray slots for the cell doors in case of lockdowns. There are so many prisoners facing disciplinary charges two blocks are used for segregation. Like most Level IV prisons in the state, the whites in segregation are almost all NLR, skins, associates, or their victims.

*They're nearly here. 13th cell. They opened pipe chase to block my view from crack of door. Pumping pepper spray fog into vent. One cell away now. Got up to wet towel, gas dropped me to knees. Uncontrollable coughing, sneezing. Throat constricting, eyes running. Neighbors blocked door with mattress. Sergeant used mop handle to shove mattress aside and spray gas. They're in. Beating the two Southern Mexicans, dragged out in cuffs, chained, shackled, still beating and kicking them on tier.*

Unlike straight edge skins and the Aryan Brotherhood in the beginning, NLR members are free to use drugs. Mad Dog ran up drug debts on the yard at Corcoran prison with Southern Mexicans and refused to pay. Four of his NLR brothers laid an ambush and stabbed him six times. "It's crazy man. We talk all this shit about racial unity and how the white man is superior, then turn right around and whack each other for Mexicans," he said. Mad Dog thinks a lot of the problems will be worked out when the shotcallers meet in SHU. "There's gonna be some sorry motherfuckers real soon," he smiled.

*Surprise. I'm not dead. You can't hurt this bad when you're dead. It's about 2 in the morning and quiet. They extracted 58 prisoners. This place looks like a battle field. The NLR, skins, and Southern Mexicans are still chained, shackled, and hog-tied outside on separate concrete yards. A transportation van pulled up. Four NLR members were hustled into the van and driven away. They're taking them to Tehachapi.*

At first, the department, like law enforcement outside, and the media, were confused about the NLR. They

## THE RIDE, (cont.)

thought it was a street gang started in Costa Mesa, California, sometime in the late 1980s. But, during Fox's news story, one shadowed NLR figure promised in an electronically disguised voice, "We're taking over the prisons." That was enough to spook the always paranoid prisonrats in Sacramento. The department decided to treat the Ride like a prison gang, validating members and associates so they could be housed indeterminately in the hole.

Tehachapi prison's SHU closed in the late 1980s after Pelican Bay was built. But, in anticipation of the demand for more segregation cells, Tehachapi SHU was reactivated July 1, 1999, according to *The Bakersfield Californian*. When full, the hole there will house 270 prisoners. It's not known whether the decision to send validated NLR members to Tehachapi rather than Pelican Bay is part of a plan to minimize further bloodshed between The Ride and the Mexican Mafia.

There's no doubt the NLR is the fastest growing racist gang in the California prison system. Historically, prison staff use race as the wedge they pound into the large prisoner population to divide and conquer. Unfortunately, hate's an easy sell. It's tough for the angry, bitter, broken people who populate prisons to set aside their differences, join together, and fight the common enemy.

But, segregation and SHU cells cost so much more than general population cells. With California's prison population at nearly 200 percent capacity, and the Legislature loath to dole out hundreds of millions of tax dollars to build more Super Max style dungeons, tough decisions must be made. In the short term, the NLR will be locked down, their hatred, fears, and suspicions turned inward. In the long run, the department may have to let them out. Back to the mainlines, and eventually back to the streets. "It don't matter," Demon said. "For every one of us they slam, three or four more youngsters are waiting to join. We'll win in the end." Perhaps so. And, if they do, doesn't that mean everyone else loses? ■

## Sex Offender Label May Require Due Process

The Eleventh Circuit ruled that absent a conviction for a sex related crime, classification of a state prisoner as a sex offender (and requiring him to register as a sex offender) implicates a liberty interest under the Due Process Clause.

Jeffery Kirby and Robert Edmond are Alabama state prisoners who filed separate pro se challenges to Alabama's Community Notification Act (Ala. Code § 15-20-20). Their cases were consolidated for appeal. Kirby's claims that the Act violates the Ex Post Facto and Double Jeopardy Clauses of the U.S. Constitution were dismissed by the district court as not being ripe for appeal (because Kirby wouldn't be required to register under the Act until after his release from prison). The Eleventh Circuit upheld the lower court's dismissal of Kirby's claims.

In Edmond's case, the district court had granted summary judgement to the state on the issues (equal protection and due process) and it also determined that Edmond's claim was not ripe (be-

cause, like Kirby, he had yet to be released from prison).

Edmond had been convicted for attempted murder but was nonetheless later classified by prison officials as a sex offender. The Eleventh Circuit, agreeing with *A.J. Neal v. Shimoda*, 131 F.3d 818 (9th Cir. 1997) [PLN, Nov. '98], ruled that "[A]n inmate who has never been convicted of a sex crime is entitled to due process before the state declares him to be a sex offender." [Those convicted of sex related offenses are presumed to have received sufficient due process at trial to later label them sex offenders].

The Eleventh Circuit reversed on Edmond's due process claim (after providing a lengthy and interesting due process analysis). The record was not sufficient to determine whether Edmond had received adequate notice and hearing to satisfy due process requirements before being labeled a sex offender by the state. Therefore, the case was remanded back to the district court to make such a determination. See: *Kirby v. Siegelman*, 195 F.3d 1285 (11th Cir. 1999). ■

## Colorado DOC Attacks Jailhouse Lawyers

In March 1998, *PLN* reported on the case of *Tebbetts v. Whitson*, 956 P.2d 639 (Colo.App. 1997), where a Colorado prisoner was convicted of attempted bartering as a jailhouse lawyer and possessing another prisoner's legal papers.

The Court of Appeals held the attempted bartering charge could not stand since just receiving letters from other prisoners with offers to pay for legal work, without more, did not meet the elements of the disciplinary charge. Tebbetts could not be convicted of possessing another prisoner's legal papers since the Code of Penal Discipline (COPD) stated that "no conduct shall constitute an offense unless provision for it is made in the code." No

such provision was in existence at that time.

To counter the growing trend of prisoners successfully helping other prisoners with litigation, and thus possessing their legal documents, the CDOC amended the COPD effective September 1, 1999, to add a new charge specifically outlawing possession of another prisoner's legal work without the other prisoner being present. Direct sanctions are up to 60 days loss of privileges, up to 20 days punitive segregation, and up to 30 days loss of good time. Indirect sanctions include earned time ineligibility for two months, loss of all grandfathered property, increase in classification points and security rating, and often job termination. ■

# Change in Fulton County, Georgia: Indigent Defense, HIV, and Community Organizing

By Lisa Zahren

The Fulton County Jail in Atlanta is the largest jail in Georgia, with approximately 3,000 prisoners held there for months and sometimes years waiting for their cases to be resolved or to be transferred to a state prison. In early 1999, the medical care for people who are HIV+ was virtually non-existent; people waited approximately one year before being indicted or talking with an attorney; the roof leaked chronically, causing water to run down the walls of the medical unit and most other units; and it was crowded with over 4,000 prisoners, approximately 1/3 of whom slept in dayrooms, in hallways, or on the floor. In the course of one year, under the pressure of two major lawsuits and a grassroots community organizing effort, the county has been forced, reluctantly, to change.

## Indigent Defense

In 1994 a prisoner in the jail named Sam Stinson filed a pro se case in federal court (U.S. District Court Northern District of Georgia) against the Fulton County Commission because he had been held in the jail for four months without speaking to an attorney or investigator about his case. He had neither been indicted nor had a bond reduction during this time. Attorneys Bob Bensing and Robert Toone of the Southern Center for Human Rights (SCHR) and a private attorney, Bruce Maloy, represented Mr. Stinson in what became a class-action lawsuit on behalf of all people charged with non-homicide felonies in the Fulton County Jail. Fulton County had routinely been under-funding the indigent defense system in the county, making caseloads for public defenders (PD) outrageously large.

In June 1999, *Stinson v. Fulton County* (Civil Action No. 1-94-CV-240-GET) settled under a consent order. Fulton County consented to adequately fund the indigent defense system and agreed that indigent people coming into the jail had to be interviewed by the PD's office within the first week. A total of \$175,000 was awarded for damages to the plaintiff class representative,

Sam Stinson, and plaintiffs' attorneys' fees and costs.

On the first anniversary of this settlement, there have been some improvements in the county indigent defense system, but improvements are far from adequate to address the problems raised in the lawsuit. Fulton County, in its most recent status report on May 24, 2000, for the *Stinson* case, reports that caseloads for the public defenders have dropped dramatically and the number of people not indicted within 60, 90, and 120 days has decreased significantly. However, the number of people in the jail who have "fallen through the cracks" remains significant. For example, a prisoner named "Jerry" was arrested in June 1999 for allegedly stealing a chair from a vacant lot. Originally a misdemeanor, his charge was upgraded to a felony, the file was lost in the transition, and Jerry was not put on a court calendar for either State Court (where misdemeanors are heard) or Superior Court (where felonies are heard). He sat in jail for 11 months until outside advocates from SCHR called State Court and the PD's office repeatedly. He is currently out on a signature bond, but he has not yet been to court.

One of the enduring problems in Fulton County and throughout Georgia is that there is no state law limiting how long someone can sit in jail before being indicted. Fulton County has expanded their Pre-Trial Release Program and has instituted "All Purpose Hearings" which get most felony cases in front of a judge for bond reductions, decisions to dead-docket a case, or plea offers within three weeks of arrest. However, if you are poor and not guilty you can still sit for months waiting to be indicted before you can go to trial. Georgia's speedy trial law does not kick in until after a defendant is indicted.

## Georgians for Equal Justice

On another front, in January 1999, Ann Colloton and Katharine Huffman of the Southern Center for Human Rights called a meeting to initiate a community organization, Georgians for Equal Justice,

to stand up on behalf of people caught up in the prisons and courts of Georgia. Within the first year, the group, made up of approximately 125 members from all walks of life from around the state of Georgia, decided to focus its energy on the Fulton County courts and jails as its first project. Since then, they have put pressure on the County Commission to make changes in the jail and court system, met with the head of the Public Defender's Office, the District Attorney, the Superior Court administrator, the Chief Judge and others. They have remained diligent in their efforts to educate people in the community and bring about change in the Fulton County justice system. However, one of their biggest challenges has come in recent months in response to another lawsuit brought against the County.

## Lack of Treatment for HIV

In November 1998, attorney Tamara Serwer, also of the Southern Center for Human Rights, received a letter from an HIV+ prisoner at the Fulton County Jail, Ruben Foster. In his letter, and many more which followed, he described horrendous living conditions and a doctor who would read to people from the Bible and tell them they were sinners instead of giving them life-saving medications. In April 1999, Serwer, along with other SCHR attorneys and private attorney, Chip Rowan, filed a federal class action lawsuit on behalf of all HIV+ prisoners in the Fulton County Jail, *Foster et al v. Fulton County et al* (Civil Action No. 1-99-900-MHS). Within a week, on April 16, 1999, the U.S. District Judge, Hon. Marvin H. Shoob, had signed a temporary consent order which said, among other things, that the County needed to hire an HIV specialist, that people on HIV medications be continued on their medications upon intake to the jail, and that accurate medical charts should be kept. While the order was good, the County and its private medical contractor, Correctional Healthcare Solutions (CHS), were not very quick to bring about the ordered changes. Throughout the summer and fall of 1999 investigators and attorneys from the Southern Center

## Fulton County (cont.)

prepared to bring the County and CHS into court.

In the fall of 1999, there were also settlement negotiations between the parties. Finally, in January 2000, the County and CHS signed onto an agreement which included all of the previous requirements from the April 16, 1999, order as well as additional requirements, such as 4 to 7 days of medications for people upon release from the jail, discharge planning to help people set up medical appointments and find other necessary social services upon release, education about living with HIV/AIDS, and a medical monitor who makes regular reports to the judge on the quality of care provided at the jail.

As part of the settlement, \$200,000 was awarded as attorneys' fees and costs. No damages were sought. All of the money paid to SCHR in the *Foster* case and in the *Stinson* case will go towards future litigation SCHR will bring on behalf of prisoners. None of this money is given individually to SCHR attorneys. All employees of SCHR, including the director of the Center, make approximately the same salary, between \$23,000 and \$27,000 per year.

The court-appointed monitor for the *Foster* case, Dr. Robert Greifinger, issued his first report in February 2000. In it, he made it clear that the County and the healthcare providers had a long way to go: dirty syringes had been found on the floor of the examining area, medical records for more than half of the prisoners requested by the monitor could not be found, and many extremely sick people continued to sleep on the floor. People continued to die because the medical care was inadequate. For example, a prisoner named "Willie" died shortly after being released from the jail in April 2000 after spending 11 months awaiting indictment, arrested for a minor drug possession. He was put on HIV medications at the jail which caused fatal liver failure because of co-infection with Hepatitis C. Although the medical care at the jail has improved, the fact that someone can be put on a fatal drug combination indicates that major problems still exist.

Systems needed to be developed from the ground up for medical care, medi-

cal records, dental care, and pharmaceutical services at the jail. Fulton County terminated their contract with Correctional Healthcare Solutions, and signed a contract with Comprehensive Medical Associates. A new chief jailer was also hired who is much more pro-active in addressing problems at the jail. As of Dr. Greifinger's June 1, 2000 order, significant improvements have been made to the health care at the jail. The inmates report to SCHR that care is currently being delivered in a more timely and professional manner to the majority of people who are HIV+.

### A New Jail for Atlanta?

On April 11, 2000, Judge Shoob ordered that the County not only improve medical care for people who are HIV+, but that the County, in meeting the requirements for this lawsuit, must also address all medical care at the jail, physical conditions in all of the housing units, and overcrowding. The Judge included these requirements in his order because the care of people who are HIV+ cannot be solved in a vacuum. As a result of this order, the court's focus has shifted from the 100 or so prisoners who are HIV+ to the 40,000 people who go through the jail annually.

**Currently, the law in Georgia states that a defendant must have a preliminary hearing within 48 hours. These hearings, however, tend to be mere rubber-stamps. Indictments in Georgia can take anywhere from two months to two years, depending on what county you are in.**

According to the April, 2000, order, the County had 30 days to present to the judge how they were going to reduce overcrowding at the jail. The next day, the *Atlanta Journal-Constitution* reported that the County was planning to build a \$70 million, 1100 bed expansion to the jail.

Georgians for Equal Justice stepped up to the plate to oppose the expansion of the jail. At the next week's County Commission meeting there were approximately a dozen GEJ members who came to oppose the new jail plan. Many other

members faxed in letters of protest. GEJ submitted a plan to the County Commission to spend money on fixing the court system, creating more alternative programs such as job training, mental health diversion programs, drug treatment, and developing transitional housing for people coming out of jail. The Commission listened to these ideas, the financial arguments, and the long-term vision of what a criminal justice system should look like. They scrapped the plan to build \$70 million worth of jail beds and said that they would look at the causes of overcrowding. One of the commissioners read the summary of the GEJ plan into the minutes to articulate his plan. That was only the beginning of the fight.

On April 24, 2000, the Fulton County attorneys submitted a plan describing how the All Purpose Hearings and Pre-Trial release have already helped reduce the jail from 4,000 prisoners last year to just under 3,000 currently. The judge was not satisfied with the County's vague plans. On May 4<sup>th</sup>, he ordered the County to come up with a detailed plan within 60 days providing concrete deadlines about how and when they would get the jail population at or below capacity.

In the weeks since the judge's order, the County Manager and the Commissioners have come up with such hare-brained ideas as setting up tents in the vacant lot next to the jail or shipping people as far as two hours away to stay in rural county jails while they wait to be indicted. Georgians for Equal Justice has met with each of the Commissioners separately to counter these proposals. They have made their agenda clear: Fulton County does not need more jail beds and it does not need to warehouse people from here to Mars, it needs to fund and organize a more efficient County Court system. Fulton County needs to get people out of jail to reduce overcrowding!

On May 25<sup>th</sup>, Judge Shoob ordered Fulton County to provide him data about the efficiency of the county's court system, including a full explanation for why each individual who has been in the jail for more than 60 days hasn't been indicted. He also ordered that the County provide him with information about how many people are charged with misdemeanors, how many with felonies, how many with serious felonies, and how many

with probation violations. Hopefully, this order in the *Foster* case will help solve some of the problems not solved by the *Stinson* consent order.

### And the work continues...

Meanwhile, there are forces putting on pressure from all fronts. GEJ continues to agitate and educate public officials. They are working on drafting state legislation, based on legislation in other states, which requires that people be indicted within a reasonable amount of time after arrest. Currently, the law in Georgia states that a defendant must have a preliminary hearing within 48 hours. These hearings, however, tend to be mere rubber-stamps. Indictments in Georgia can take anywhere from two months to two years, depending on what county you are in.

The *Stinson* investigators continue to work toward getting people attorneys and getting cases resolved more quickly. The *Stinson* attorneys (now Marion Chartoff of SCHR and Bruce Maloy) are working on a strategy for the best legal action to caulk up the remaining cracks in the Fulton County court system.

The attorneys from the *Foster* case have recently joined a legal team representing prisoners in a class action lawsuit at the DeKalb County Jail, *Adams v. Dorsey* (98CV-11747-5). It is the second largest jail in the state and DeKalb County covers a large portion of the city of Atlanta. It is the neighboring county to Fulton County. The case, which deals with medical care and guard brutality, was filed in Superior Court of DeKalb County. Correctional Healthcare Solutions, the medical provider at Fulton County when *Foster* was originally filed, is now the medical provider at the DeKalb County Jail.

There is much more work to be done, and there will be even more work on the part of the advocates and activists to maintain the changes once they are in place. Progress is being made in Fulton County and we will not let up. ■

*Lisa Zahren is an investigator at the Southern Center for Human Rights. SCHR represents prisoners in civil class action lawsuits and represents people facing the death penalty. Their work is limited to Georgia and Alabama.*

## Prison Physician Liable For Refusal of Care

By Ronald Young

The Seventh Circuit Court of Appeals held that a federal prisoner's *Biven*'s claim did not state a medical care claim against a prison guard who failed to have the prisoner checked out after the prisoner complained of pain. The court also held, however, that fact questions precluded summary judgment on the medical care claim as it related to the care provided to the prisoner by the prison physician.

Clifford B. Jones, a federal prisoner incarcerated at Chicago's Metropolitan Correctional Center (MCC), filed a civil rights suit under *Biven v. Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388, 91 S.Ct. 1999 (1971) (known as a "Bivens" claim). Jones sued four employees of the Federal Bureau of Prisons, alleging that they had "subjected him to excessive force and refused to give him medical treatment, in violation of the Eighth Amendment's prohibition against cruel and unusual punishment."

The district court dismissed the medical care claim in response to the prison employees' motion in the alternative for dismissal on the pleadings or summary judgment. The excessive force claim was allowed to proceed to a bench trial after which the district court found for the prison employee defendants. Jones appealed the dismissal of the medical care claim.

On appeal Jones informed the court that he was pursuing his medical care claim only against two of the MCC employees—Dr. Edwin Lopez, a prison physician, and prison guard Stanley Paciorek. According to Jones, on one occasion he "had complained to an MCC official about pain in his right arm and asked to see a doctor," but Paciorek overheard the complaint and "informed the official that nothing was wrong with Jones. Paciorek then ordered Jones placed in isolation," who then went without medical attention for five days.

With his pain worsening, Jones was finally able to see Dr. Lopez. "Dr. Lopez ordered that Jones be handcuffed only from the front, but otherwise provided no treatment." Dr. Lopez refused Jones' many request for pain medication. Even

with Jones expressing concerns about losing his arm, Dr. Lopez refused to make an appointment for Jones to see a specialist, even going so far as to say to Jones, "So you lose your arm, that won't kill you."

Jones was finally able to see a neurologist after six months of suffering, and was diagnosed with "a nerve blockage in his right elbow." The neurosurgeon prescribed a sling, medication, and a consultation with an anesthesiologist. However, back at MCC, "Dr. Lopez essentially disregarded the specialist's advice." Jones grew worse, losing the use of his right arm from the elbow down, his right hand swollen, cracked and bleeding. He suffered for over a year until a ganglion nerve block was performed on him to correct the problem.

The district court had dismissed the medical care claim against Paciorek because Jones' complaint did not allege that Paciorek "knew Jones was suffering from a serious medical condition or that he refused to do anything about Jones' medical needs." Even though the appeals court thought Paciorek should have had Jones medically checked out after he complained of pain, it found that Paciorek did not have subjective knowledge of a substantial risk of serious harm based upon Jones' one complaint, and affirmed the district court's dismissal of the complaint against Paciorek.

Stating that "Jones's allegations regarding Dr. Lopez are more troubling," the appeals court found that if proven, "these allegations describe the 'deliberate indifference to serious medical needs' that *Estelle* and *Farmer* require. See: *Estelle v. Gamble*, 429 U.S. 97, 97 S.Ct. 285 (1976); *Farmer v. Brennan*, 511 U.S. 825, 114 S.Ct. 1970 (1994); *Ralston v. McGovern*, 167 F.3d 1160 (7th Cir. 1999). Therefore, the appeals court held Jones' alleged facts sufficient to survive a motion for summary judgment and the district court "should not have entered judgment in favor of Dr. Lopez." The district court judgment in regard to Dr. Lopez was reversed and remanded for further consideration of material disputed facts. See: *Jones v. Simek*, 193 F.3d 485 (7th Cir. 1999). ■

# Washington Earned Early Release Credits Create Due Process Liberty Interests

by Mark Cook

The Washington State Court of Appeals, Division One, has held that: (1) a prisoner's right to community custody placement created limited due process liberty interests, but (2) delay did not violate prisoner's due process rights.

Matthew S. Crowder, a Washington prisoner, was convicted of two counts of third degree rape of a child. He was sentenced to 60 months' confinement. He became eligible for placement in community custody on October 24, 1997. However, he was not released into community custody until February 2, 1998, 101 days after his earned early release date for community custody. Before his release he filed a personal restraint petition asserting that although he had been granted early release credits, they were being arbitrarily denied without due process.

The State conceded that Crowder was eligible for transfer into community custody on October 24, 1997, however, the State did not agree that he was therefore entitled to release. It was the State's position that due to

Crowder's own noncompliance with sexual predator release factors or other Department of Corrections (DOC) program factors, he could not be released.

The court held that the statutory right to earned early release credit creates a limited liberty interest requiring minimal due process. *In re Personal Restraint Petition of Fogle*, 128 Wash.2d 56, 65—66, 904 P.2d 722 (1995). The State argued that Crowder possessed no limited liberty interest after the court's decision in *Sandin v Conner*, 515 US 472 (1995) wherein the court redefined the circumstances under which a state may create a liberty interest. The court in *Sandin* said the state will be held to create a constitutional liberty interest that imposes "atypical and significant hardship on the inmate in relation to the ordinary incidents of prison life." The Crowder appellate court held that, "While the argument may have some appeal and potential merit, the final determination of the effect of *Sandin* is left to our State Supreme Court."

Nevertheless, the court ruled against Crowder because the record showed that he and DOC officials attempted to place him a number of times, but that for legitimate reasons, including Crowder's own withdrawal of a suggested placement plan and/or that the suggested placement would violate the terms of his sentence, successful earlier placement in community custody was prevented. Crowder's argument was that it was solely the DOC's responsibility to place him into community custody, or give him a general release on his early release date. The court found that Crowder's contention was not borne out by the statutory scheme or the guidelines for the DOC program which specified that community placement offenders only became eligible for transfer to community custody status. Such a transfer is "in lieu of" early release. Thus, the DOC was prohibited from a general release based on earned early release credits, but had only the discretion to consider the offender for transfer to community custody. See: *In Re Crowder*, 985 P.2d 944, 97 Wa.App. 598, (Wash.App.Div. I (1999)). ■

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# Fines Against WA Civil Commitment Center Stayed

by Dan Pens

In the May 2000 issue of *PLN* we reported the progress of a federal court injunction issued in 1994 against Washington's Special Commitment Center (SCC), the nation's first civil commitment facility specifically for the long-term detention and "treatment" of "sexual predators." In his Nov. 15, 1999 contempt ruling, U.S. District Court judge William L. Dwyer bemoaned that constitutionally minimum "basic treatment requirements were ordered long ago [and] the continued failure to achieve full compliance is unexcused." He gave the SCC until May 1, 2000 to achieve full compliance with the court's 1994 injunction or face the imposition of fines totaling \$50 per day per SCC detainee.

On May 5, 2000, judge Dwyer held another fact-finding hearing to determine the state's progress in complying with the injunction. The results were mixed. Though the court found that the state had "worked diligently toward the goal of bringing the SCC program up to minimum professional and constitutional standards... [s]hortfalls continue to exist in every area as the result of earlier failures to take the necessary steps, but these can be cured rapidly if the current energetic approach continues."

His ruling concluded that the state's "efforts and progress... justify a modification of the contempt order, but do not justify dropping the sanction at this point or dissolving the injunction." He ordered that the \$50 per day per detainee sanction "will accrue monthly but will not be paid pending further order of the court... the accrued total will be canceled or ordered paid depending on whether the defendants have completed or substantially completed their compliance with the injunction before the time of the next scheduled hearing," slated for December 5, 2000.

Each month the state must submit an accounting to the court of the amount of the accrued sanction (which is, at the time of this writing, approximately \$175,000/month).

Dwyer recognized numerous accomplishments achieved by the SCC since the Nov. 1999 contempt order. Among them: provision of an additional \$3 million for staff hiring and training and \$14 million budgeted for the first stage of a new facility. But Dwyer also cited a failure to fill the long vacant position of

permanent clinical director, and a need for more staff training and for improved treatment plans.

But Dwyer declared "the most important piece of unfinished business in the SCC program" is the requirement that the state provide for "community transition of qualified residents, under supervision, when they are ready for a less restrictive alternative." In other words, in order for the state's "treatment" to meet professional and constitutionally minimum standards, there must be some way for "residents" of the treatment program to eventually earn their release back into the community. In the 10 years that the Washington SCC has operated, not one resident has been deemed by the program "treated" sufficiently to be released to the community.

Dwyer noted that (according to SCC director Dr. Seling's testimony), "[t]he SCC plans to transfer two or three residents to off-island facilities in the near future [the SCC is located within the security perimeter of the state prison on McNeil Island], but the ad hoc negotiations for their placement are no substitute for a systemic transition program with adequate LRA [Less Restrictive Alternative] facilities. Defendants must move decisively, and with adequate funding, to establish LRAs for qualified residents."

With the clock running, and fines accruing to the tune of \$175,000 a month, it will be interesting to see how the next chapter of this long-running serial cliff-hanger will play out. Will the state end up paying hefty fines and find itself under ever greater pressure from the court to give up its game of preventative detention masquerading as treatment? Or, just when you think the court couldn't possibly bend any further backwards, can Judge Dwyer craft yet another wishy-washy ruling that will allow the game to continue? Tune in next year. ■

Source: *Whitestone Newsletter* [the most detailed and comprehensive source of news relating to civil commitment in the U.S. Subscriptions to the *Whitestone Newsletter* can be obtained by sending \$10 to: Whitestone Foundation, P.O. Box 1138, Bothell, WA 98041-1138. Sorry, stamps in trade for *Whitestone* subscriptions not accepted.]

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# U.S. Parole Commission Retaliation Reversed

by Scott Fleming

The Ninth Circuit U.S. Court of Appeals issued a ruling that safeguards the due process rights of prisoners whose release dates are committed to the discretion of parole agencies. In *Bono v. Benov*, 197 F.3d 409 (9th Cir. 1999), the court affirmed the application of the *North Carolina v. Pearce* presumption of vindictiveness to the actions United States Parole Commission.

In *Pearce*, 395 U.S. 711 (1969), the Supreme Court ruled that a presumption of vindictiveness applies whenever a sentencing judge who has been reversed on appeal imposes a harsher sentence upon a second conviction than was imposed after the first. Unless the judge places on the record, at the time of sentencing, valid reasons for imposing an increased sentence, the increased sentence will be presumed to be the result of vindictive retaliation, which violates the defendant's due process right to pursue an appeal without fear of being penalized.

In *Bono*, the petitioner, a federal prisoner, had long held a presumptive parole date of 30 years. After the release date was granted, but before it actually arrived, Bono successfully brought two habeas corpus actions against the Parole Commission. Immediately after winning the second habeas petition, the Parole Commission extended Bono's release date from 30 to 42 years, but provided no reason for doing so other than the severity of his original offense.

Because he had an exemplary conduct record and there was no apparent justification for the extension of his release date, Bono instituted another habeas action. He argued that the Parole Commission had extended his sentence in retaliation for his successful habeas petitions, and therefore the *Pearce* presumption of vindictiveness should apply to his situation. The district court, finding that the Parole Commission had offered no valid reason for extending Bono's sentence, agreed, ruling that the Parole Commis-

sion had acted vindictively. Because Bono's original release date had passed, the Court ordered him released immediately. On appeal, the Ninth Circuit affirmed the district court's order.

The ruling in *Bono* should provide some comfort to prisoners who find it necessary to sue parole agencies. It should be noted, however, that as long as a parole agency cites some justifiable reason at the time it withdraws a release date, the *Pearce* presumption probably will not be available, even if the sentence extension comes immediately on the heels of a successful court challenge. Nevertheless, *Bono* does place some measure of restriction on the seemingly boundless discretion of parole agencies. See: *Bono v. Benov*, 197 F.3d 409 (9th Cir. 1999). ■

[Note: the author argued Mr. Bono's case in the Ninth Circuit.]

## \$53,000 Settlement in AL Conditions Suit

On April 8, 2000, the Alabama Department of Corrections settled a conditions lawsuit by agreeing to pay eight prisoners \$53,000 in damages and establish basic standards of care at the Loxley Community Work Center in Mobile, Alabama.

In August, 1997, eight prisoners were placed in a 7 x 11 foot holding cell at the Center, with no air conditioning, ventilation, a leaky toilet, dirty mattresses and bugs. One of the prisoners, Richard Bohannon, was placed in the 100 degree cell and suffered a rash, muscle spasms and had to be hospitalized for dehydration. The prisoners filed a class action suit claiming these barbaric conditions violated their Eighth amendment right to be free from cruel and unusual punishment.

Henry Brewster, an Alabama attorney who represented the plaintiffs, said the Loxley Work Center "sounded like the black hole of Calcutta. It had a real air of desperation."

Under the terms of the settlement, the Alabama DOC agreed to pay the eight prisoner plaintiffs \$53,000 in damages and to establish minimum standards for the holding cell. The settlement requires the Alabama DOC to hold no more than two prisoners at a time in the holding cell; that the cell be equipped with hot and cold running water, a functioning toilet, adequate lighting and ventilation and comport with fire safety regulations. Prisoners must also be supplied with basic personal hygiene supplies such as toilet paper and soap. ■

Source: *Birmingham News*

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# Counsel Awarded High EAJA Fee Despite Contingency Fee in BOP Rape suit

By Mark Cook

The U.S. District Court for the Northern District of California held: (1) prisoners' action was not one sounding in tort, so an attorney fee award was not barred by sovereign immunity; (2) fact that attorneys received a contingency fee award from cash settlement did not preclude fee award for time spent on injunctive relief; (3) prisoners, who obtained money and comprehensive prison reform were prevailing parties under the Equal Access to Justice Act (EAJA); (4) position taken by government was not substantially justified; (5) there were no special circumstances that would warrant denial of award; (6) time spent in monitoring government compliance with settlement agreement was recoverable; (7) time spent in preparing fee application was excessive; and (8) expertise in complex institutional prison reform litigation warranted upward departure from EAJA's statutory hourly rate cap. The court awarded plaintiffs' counsel a total interim fee award of \$508,897 in attorney fees and \$34,994 in costs. The court held that lead counsel was entitled to his normal rate of \$325 an hour for his services, rather than the \$75 EAJA rate.

The importance of this case is that it will encourage attorneys to represent prisoners in litigation. Federal prisoners Robin Lucas, Valerie Mercadel, and Raquel Douthit, filed the initial action on August 13, 1996, seeking damages and injunctive relief from present and former officials of the United States Department of Justice, Bureau of Prisons (BOP). The complaint alleged that BOP officials violated their constitutional rights by subjecting them to a pattern of serious sexual assaults, sexual harassment and unwelcome sexual advances orchestrated and facilitated by prison officials.

Plaintiffs, all of whom are female federal prisoners, filed a complaint alleging that in August and September of 1995, they were transferred to the Special Housing Unit (SHU) at the Federal Detention Center at Pleasanton, California. The Center is generally used to confine male prisoners, however at the time of plaintiffs' transfers, there were a few women

housed among the male prisoners. Guards allowed male prisoners to roam the central corridors and harass plaintiffs through the food port or other opening in the cell doors. Male prisoners repeatedly propositioned plaintiffs for sex and one plaintiff was physically assaulted on the head. The guards also gave male prisoners access to plaintiffs' cells without their consent in the middle of the night, which resulted in several sexual assaults. Plaintiffs were also sexually harassed by guards. On one occasion, a guard demanded that plaintiff Mercadel show him her breasts or genitals in order to receive a prison issued T-shirt. When she refused to do so, she was not given the T-shirt.

Plaintiffs repeatedly asked prison personnel to stop the above conduct and in late August 1995, Lucas made an official complaint regarding the practice of allowing male inmates into her cell in the middle of the night. Within days, the complaint became common knowledge among the male prisoners and guards; nonetheless, she was not transferred to another place of confinement. On or about September 22, 1995, Lucas' cell door was opened while she was asleep and three men entered her cell, and restrained her and handcuffed her from behind. She was then brutally beaten, raped, and sodomized. Her life was threatened and she was told that the attack was in retaliation for her complaint.

About November 17, 1995, after their attorneys intervened, plaintiffs were transferred to the Alameda County Jail, in Santa Rita. Federal authorities subsequently conducted a criminal investigation in which plaintiffs cooperated. Plaintiffs further alleged that the above conduct, and the lack of appropriate training policies, and procedures that allowed such conduct to occur, violated their rights under the First, Fourth, Fifth and Eighth Amendments of the U.S. Constitution.

Approximately two and a half years after the action was filed, the parties entered into a settlement agreement in February 1998. The agreement required

the BOP to implement a wide range of reforms affecting every federal prison. Finally, the defendants agreed to pay the plaintiffs a total of \$500,000 in damages. Counsel for plaintiffs received a 25% contingency fee award of \$125,000. Since finalization of the settlement, plaintiffs' counsel monitored compliance with the agreement, and reviewed progress reports and drafts of new policies, procedures, and training materials. [PLN, June, 1998]

On November 3, 1998, plaintiffs filed the motion at issue seeking interim fees under the EAJA for time expended on the claims for injunctive relief.

## A. Sovereign Immunity

The defendants argued that because the United States has not waived its sovereign immunity for fee awards in tort actions, and this action sounds in tort, the plaintiffs' application for fees was barred by sovereign immunity. The court, citing numerous cases, ruled to the contrary. The court found that because the plaintiffs' complaint was aimed primarily at obtaining relief against BOP officials to end practices that violated constitutional rights under the Fourth, Fifth, and Eighth Amendments and not merely the conduct manifesting in actions that could be described as tortious, the case did not "sound in tort". It concluded that plaintiffs' request for fees with respect to the time spent on their constitutionally based claims for injunctive relief against federal defendants in their official capacity was not barred by sovereign immunity.

## B. Prevailing Party

The court found that even though the action resulted in a settlement agreement, the plaintiffs qualified as the prevailing party because they succeeded on significant issues in the litigation which achieved benefit to the plaintiffs in bringing the suit. *Texas State Teachers Ass'n v. Garland Independent School District*, 489 U.S. 782 (1982). The defendants did not dispute that plaintiffs

## EAJA Fee (cont.)

qualified as prevailing parties for purpose of a fee award under the EAJA.

### C. Substantial Justification

Once a party establishes its status as a prevailing party under the EAJA, a rebuttable presumption arises that it is entitled to an award of fees. The defendants primarily argued that the court should find they were substantially justified with respect to the underlying conduct because the United States never admitted any wrongdoing and plaintiffs never proved their allegations. Defendants argued the record is bereft of any evidence to support plaintiffs' charges and they emphasized that no criminal charges were brought despite a criminal investigation. The government relies on the settlement agreement which required no proof or evidence and the government's denial of further liability. The court concluded that the government failed to meet its burden of demonstrating that the underlying conduct giving rise to the claims for injunctive relief was substantially justified. Thus, the plaintiffs could not be denied fees because the government did not demonstrate their position was substantially justified.

### D. Special Circumstances

The government argued two "special circumstances" that would make a fee award unjust. First, they argued that because plaintiffs' counsel already recovered fees under their contingency fee arrangement (for damages), any additional award of fees would be unjust. Second, they argued that because the matter involved no litigation, no motions practice, no pre-trial preparation, etc., plaintiffs' request for fees should be denied as unconscionable. The court ruled against the first government argument citing to *Venegas v. Mitchell*, 495 U.S. 82, 90 (1990) which recognizes that a party may collect statutory fees in addition to a contingency fee. The court found the second argument bordering on frivolous because of all the hours and thousands of pages of paperwork produced over such a long period of litigation.

### E. Calculation of Reasonable Fee

The defendants argued against the plaintiffs' request for a higher hourly rate than the statutory \$75.00/hour rate provided by the EAJA. They contended that no other special factor warranted a higher hourly rate and objected to paying more than the statutory rate for lead counsel Michael Bien and Geri Green. The court found Green's particular experience in criminal law was no doubt helpful to the civil case, but the court was not persuaded that it was necessary to the successful litigation of the action. As such, the court declined to find Green entitled to an hourly rate that exceeded the statutory cap based on "special factors". On the other hand, the court found Bien's distinctive knowledge and specialized skills in complex institutional prison reform litigation was necessary to the litigation. The court concluded that Bien should, thus, be compensated at "prevailing market rates for the kind and quality of services furnished," 28 U.S.C. § 2412 (d) (2) (A), rather than at the statutory hourly rate cap of \$75.00. Thus, the court ordered that Bien be compensated at his normal rate of \$325 an hour. See: *Lucas v. White*, 63 F.Supp.2d 1046 (N.D.Cal.1999). ■

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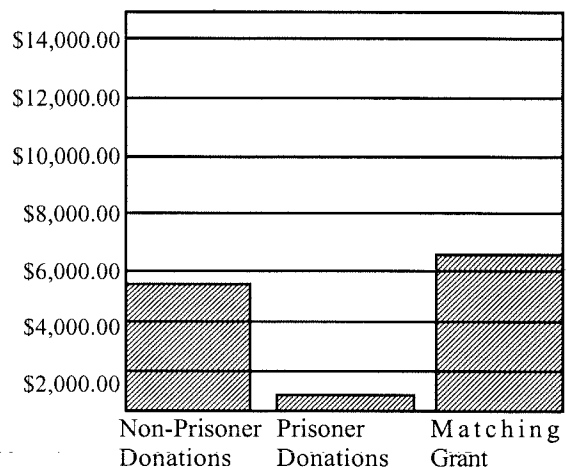
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# Bush's Conservative Compassion: Allowing a Life Sentence for Three Bounced Checks

by Matthew T. Clarke

Texas Governor George Bush has based his presidential aspirations on the questionable concept of compassionate conservatism, but how compassionate is the Texas criminal justice system in dealing with its citizens under the Bush regime.

Consider the case of Billy Wayne Brown, a Texas prisoner doing a life sentence for having written three insufficient funds checks with a total value of \$ 952.

Billy Wayne was first arrested in 1968 when he bounced a \$56 car insurance check. His second case came in 1975: a \$256 check for a CB radio and antenna. The third case was for a \$640 rent check he bounced in October, 1981.

Billy Wayne had signed the check in question in his third case, but it was a pre-signed check that his wife had torn out of his checkbook and used to write the overdraft. He felt he was innocent, he had paid off the bad check, so he took the case to a jury trial. On April 27, 1982, the jury convicted him of the theft of service by writing the bad check.

Three strikes laws are nothing new to the Texas criminal justice system. In their previous incarnation, they were miserable failures as Billy Wayne's case shows. Billy Wayne has always honestly admitted his prior convictions. Once convicted of the third felony, the judge had no choice under the then existing three strikes law, but to sentence Billy Wayne to life in prison.

Ironically, Texas changed the three strikes law six months after Billy Wayne's conviction. The same change in the law reduced the offense Billy Wayne was convicted of, bouncing a check for less than \$750, to a misdemeanor. Had Billy Wayne been convicted under the changed law for a misdemeanor, the most he could have received was one year in the county jail. Even if he had been tried for felony theft with two prior felony convictions, under the new three strikes law the sentencing range would have been 25 years to life.

Billy Wayne's trial judge, the honorable Billy John Edwards, District Judge of the 42nd Judicial District Court of Taylor County, Texas, has twice written the Board of Pardons and Paroles, asking them to

commute Billy Wayne's sentence to 25 years, the sentence he states he would have given Billy Wayne had he been convicted of felony theft under the amended three strikes law. The board refused to commute the sentence.

August 28, 1989, Billy Wayne made parole. He moved to Rowlett, Texas, started working for Interstate Batteries System of America and was placed on annual report parole status after fourteen months. He became a pillar of the community. So successful was he that, in February 1995, Interstate Batteries honored him as the top salesman for the company in the nation. The awards presentation took place in Dallas. Billy Wayne was at the top of his profession and having one of the best times of his life. Soon events would set in motion the chain of events which would lead to the worst times of his life.

On his way back to his home from the awards banquet, Billy Wayne was pulled over by an inexperienced Rockwall (Texas) City police officer after doing a rolling stop at an intersection at night. The officer asked Billy Wayne if he had been drinking and he admitted to having imbibed two mixed drinks prior to the banquet five hours earlier. The police officer performed a field sobriety test, which Billy Wayne was able to easily pass except for touching his nose while standing on his left leg, which has a pin and two screws from a previous ankle injury. As he reached down to show the officer the scars from the ankle injury, Billy Wayne made the mistake of telling the police officer that he didn't want any trouble because he was on parole. The police officer immediately drew his gun and placed Billy Wayne under arrest for DWI.

Billy Wayne was booked into jail, during which he was able to tell the booking officer from memory his license plate and driver's license numbers. All of this, as well as the field sobriety test and Billy Wayne walking down a long corridor coming into the jail, was on videotape. When the case went to trial twenty-three months later, all the defense attorney did was show the jury the video tape and argue that Billy Wayne obviously was not drunk. The jury acquitted Billy Wayne after about a half hour

of deliberation. Billy Wayne went back to his job and family thinking all was well.

However, all was not well. Billy Wayne was arrested three weeks later for parole violation. Amazingly, the violation was based on his having been arrested for the very same DWI the jury acquitted him of and for not reporting the arrest to the parole board. Billy Wayne, whose only parole requirement at the time was to fill out a written report form once a year and mail it to the parole board in Austin, Texas, had believed that he did not have to report the arrest as it did not result in a conviction.

Despite numerous character witness who were well known within the community, on April 29, 1997, the parole board revoked Billy Wayne's parole. Now Billy Wayne Brown languishes in a Texas prison, having done over ten years flat on his life sentence, having done nothing more serious than bouncing three checks.

Even while in prison, Billy Wayne has not set aside his ambitious spirit. During his incarceration he has: (1) earned an Associate of Science Degree from Henderson County Community College; (2) earned an Associate of Arts Degree (with honors) from Alvin Community College; (3) completed a U.S. Department of Labor vocation training course in Data Processing and Data Entry; (4) earned a Vocation Certificate in Welding from Lee College; (5) earned a Bachelor of Science Degree in Business Administration from Stephen F. Austin University; (6) enrolled in a Master's Degree Program at University of Houston-Clear Lake; (7) enrolled in advanced Data Processing at Alvin Community College.

Should we hold Texas Governor George Bush responsible for the harsh sentence Billy Wayne Brown received under the old three-strikes law? Probably not; however, Bush is responsible for not commuting Billy Wayne's life sentence to a sentence that more justly reflects the crime he was convicted of and Bush is certainly responsible for Billy Wayne's having languished for three years after having been revoked for a technical parole violation over a crime which he was not guilty of. Under George Bush, the justice system in Texas is criminal. So much for compassion in conservatives. ■

# Censorship Challenged in CO DOC

Eight publishers, the Association of Alternative Newsweeklies, and seven Colorado prisoners have filed suit in Federal District Court challenging the Colorado Department of Corrections (CDOC) Administrative Regulation (AR) 300-26 governing prisoner reading material. Over the past three years the prisoners, housed in various CDOC facilities, have had numerous magazines and books censored and declared contraband with little or no effective recourse.

The publishers and their censored publications include New Times, Inc. and the Association of Alternative Newsweeklies (*Westword*), Dark Night Press (*Dark Night Field Notes*), Clay Douglas (*Free American*), Larry Rice (*Cry Justice Now*), Doret Kollerer (*North Coast Xpress*), Maoist International Movement (*MIM Notes*), the Barrio Defense Committee (*Voz Del Barrio Aztlan*), and Christine Donner (*Shut Them Down*). Christine Donner is also the coordinator of the Prisoner's Rights Project of the Rocky Mountain Peace and Justice Center.

In addition to the eight publications of the plaintiff publishers, other censored publications identified in the complaint include 11 magazines: *Rolling Stone*, *VIBE*, *Lowrider* and *Lowrider Arte*, *The Source*, *Blaze*, *Yo*, *Scenario*, *Aerosol Art*, *Voz Fronteriza*, and *Drama Script Review*. Six books were identified, including: *The Hidden Faces of Eve*, *Like Water for Chocolate*, *Criminal Injustice: Confronting the Prison Crisis*, *A Nahuatl-English Dictionary* and *Concordance to the Cantatas Mexicanos*, *The Gathering Storm: America's Militia Threat* (by the founder of the Southern Poverty Law Center), and even *Signed English: A Basic Guide* (so a prisoner could learn to communicate with a hearing-impaired visitor). These are just examples of wide-spread censorship in flagrant disregard of prisoners' constitutional rights.

The plaintiff's §1983 constitutional law claims include three First Amendment challenges for (1) a vague and overbroad regulation, (2) improper censorship against the publishers, and (3) improper censorship against the prisoners. Two Fourteenth Amendment challenges include (1) Due Process for the publishers and (2) Due Process for the prisoners.

According to the Complaint, the CDOC has arbitrarily and unjustifiably censored this

reading material on the basis of criteria that are overbroad, subjective, and vague. The publishers are not notified and the only due process afforded the prisoners is the inmate grievance system, if they are even notified of the censorship. The grievance system in this instance also deprives the prisoners of due process since the CDOC "does not require the censors to identify the articles or information which they believe threaten institutional security." Even the officials responding to the grievances do so without the benefit of the censored material which is usually destroyed or mailed out before the grievance process can run its course.

Commenting on some of this material, the Colorado ACLU Director, Mark Silverstein, says the "censorship of these music magazines reflects racist paranoia." He says that some CDOC censors "apparently see 'gang signs' in every photo in which the hands of an African American performer are visible." After reviewing the censored issues of *Westword*, Patricia Calhoun, editor of *Westword*, says "the issues that seemed to have the biggest trouble getting through to the prisoners were the issues in which we wrote about the prisons, problems at the prisons."

The complaint seeks a declaratory judgment of unconstitutionality, an injunction against the challenged practices, and attorney fees. See: *New Times Inc. v. Suthers*, USDC D CO. Case No. 00-WM-612. ■

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## News in Brief

**AL:** Citing "loyalty problems," on June 19, 2000, prison commissioner Mike Haley removed deputy commissioner John Shaver from his \$71,000 a year job as head of the DOC's treatment programs. Shaver was transferred to a post as administrative services officer at a state prison, with a \$20,000 a year pay cut. No details were given for the demotion.

**AR:** On July 12, 2000, former Washington County Detention Center guard Earl Guillory Jr., 38, of Fayetteville, admitted he performed oral sex on two girls under the age of 17 who were imprisoned at the jail. Guillory had already pleaded guilty to two counts of first degree violation of a minor and had been sentenced to six years probation. Guillory violated the terms of his probation by writing hot checks, for which he was sentenced to three years in prison. Apparently writing bad checks is deemed a more serious offense than raping imprisoned children. At the sentencing, judge William Storey told Guillory, "You've gotten a huge break in these cases. I hope you'll take advantage of it."

**Brazil:** On July 12, 2000, 800 prisoners at the Ahu provisional prison in Curitiba seized control of the prison to protest overcrowding as the prison was designed to hold 300 prisoners. The prisoners seized 17 prison employees as hostages and burned the prison's main building.

**Canada:** On May 17, 2000, at least 70 prisoners in Toronto's West Detention Center went on hunger-strike to protest jail cutbacks in tobacco sales and smoking. The jail's goal is to become smokefree by the end of the year.

**CO:** On May 17, 2000, 30 prisoners at the Luna County Detention Center protested poor food quality at the jail by barricading themselves in a cell and setting a mattress on fire. Guards seized control of the cellblock after 30 minutes. No injuries were reported.

**CT:** On May 16, 2000, state prison guard Anthony Maldonado, 32, was charged with second degree assault, first degree reckless endangerment, theft of a firearm and two counts of threatening. Maldonado is accused of finding his ex-wife in her boyfriend's car, smashing the car's window, pistol whipping the boyfriend and then threatening to kill his ex-wife. Maldonado was arrested at home where police confiscated numerous firearms.

**KY:** On June 30, 2000, Tom Dreher, warden of the Blackburn Correctional Complex in Lexington, resigned from the state DOC. On

May 18, 2000, Dreher was drunk when he crashed a prison vehicle into a highway guard rail.

**MS:** On June 14, 2000, a fight broke out in Unit 29 of the Mississippi State Penitentiary in Parchman after a church service. Fourteen prisoners were injured, including two who were stabbed. Some 80 prisoners were involved in the ruckus. No reason was given for its cause in media.

**NJ:** On May 17, 2000, Kershaw county jail guard Michael Wach was charged with brining cigarettes into the jail for two unidentified prisoners (and charging them \$10 a pack to do so), and then helping them attempt to escape. Wach was being held in the Camden county jail for his own protection.

**NJ:** On April 25, 2000, New Jersey Training School for Boys guards Richard Ousley, 47, and Roberto Medina, 47, were charged in state court with official misconduct, child cruelty and witness tampering. In 1999, seven high school students touring the juvenile prison were separated from their classmates, lured into a cell where juvenile prisoners offered a closer look at prison life by shoving and punching them. Two of the prisoners involved in the incident have already been convicted and sentenced to 5 and 3 years in prison, respectively. Two more await trial. The guards' charges stemming from their role in allowing the incident to occur and then trying to cover up the attack.

**NY:** On July 3, 2000, Pablo Rodriguez, 44, a guard at the Rikers Island jail in New York City, was arrested and charged with raping a 34 year old female jail prisoner.

**OH:** On June 6, 2000, Harry Adkins, 53, was arrested by state police while breaking into the London Correctional Institution's cattle field area to hide 3.5 ounces of marijuana and 50 prescription pills. Cathleen Pennington, 29, was arrested when she returned to the prison to pick up Adkins. Both were charged with conveying drugs into a prison. Apparently breaking into a prison is not a crime.

**OR:** On June 28, 2000, a tear gas canister on the vest of a guard at the Oregon State Penitentiary in Salem exploded accidentally, forcing the evacuation of a cellblock and the prison visiting room. Prison officials said they would contact the grenade's unnamed manufacturer.

**TX:** On June 10, 2000, Norman Saxer, 31, a guard at the Texas Dept. of Criminal Justice's Byrd Diagnostic Unit in Huntsville was ar-

rested on charges of strangling and shooting his neighbor, Emily Thorson, 18, in Conroe. Thorson had helped Saxer's wife move out of their apartment when the couple separated on May 26. Saxer had threatened to kill anyone who helped his wife leave him.

**TX:** On July 13, 2000, the state Commission on Judicial Conduct reprimanded Houston district judge Lon Harper for disassembling and cleaning two Colt revolvers during jury selection in the 1999 capital murder trial of Anthony Haynes, who was sentenced to death for killing a policeman. Harper told media, "I guess I won't do anymore handgun repair on the bench."

**Turkey:** On July 5, 2000, military police stormed Istanbul's Bayrampasa prison to retake it from protesting prisoners. Five hundred political prisoners took 11 guards hostage, seized the prison and burned large parts of it to the ground. The prisoners were protesting the removal by military police of a political prisoner accused of rioting at the prison a month before. Turkish prisoners are frequently subjected to savage torture by the Turkish military and police. On the same day, leftist prisoners at the prison in Burdur barricaded themselves in their cells to prevent 11 prisoners from being taken to court. Police claimed only one guard was injured by flying glass when both prisons were stormed and retaken.

**USA:** On July 10, 2000, president Bill Clinton commuted the prison sentences of Louise House, Shawndra Mills, Amy Pofahl, Serena Nunn and Alain Orozco. All five were serving sentences for drug offenses. White house spokesman Jake Siewert said Clinton commuted the women's sentences because, "The president felt they had served a disproportionate amount of time. They received much more severe sentences than their husbands and boyfriends."

**UT:** On March 22, 2000, Allen Russell, 30, was charged with manslaughter in the heroin overdose death of Dustin Robertson. Both men were prisoners at the Utah State Prison in Draper in June, 1999, when Russell injected Robertson with heroin. Robertson later died of an overdose.

**UT:** On June 6, 2000, former Utah State Prison sergeant Jerry Kessler was sentenced to one year in jail after pleading guilty to one count of attempted forcible sexual abuse and misdemeanor sodomy. Kessler admitted to forcing at least two male prisoners to perform oral sex on him as well as anally raping one of the victims. One of the victims spit Kessler's

## News in Brief (cont.)

semen into a rubber glove after oral sex and gave it to his girlfriend during a visit. The girlfriend gave the semen, and reported the crime, to local police who matched the semen to Kessler with DNA testing. Kessler had threatened to have the prisoners beaten or killed by other prisoners if they did not submit to his sexual demands.

**VA:** On May 12, 2000, Wallens Ridge State Prison warden Stanley Young filed a defamation and libel suit in local federal court against *The New Haven Advocate*, *The Hartford Courant* and the *Connecticut Post* newspapers; Connecticut state legislators Alvin Penn and Michael Lawlor, and Carolyn Nah, president of the Connecticut NAACP. Young claims the newspapers and legislators have defamed him by accusing him of being a racist and encouraging his almost all white prison staff to abuse the mostly black and Hispanic prisoners sent to Wallens Ridge by the state of Connecticut. Young's display of "civil war memorabilia" in his office has raised hackles in Connecticut. The suit claims the defendants have conveyed the impression that Young is a racist, a member of the KKK, a liar, and tolerates abuse of his staff. A defense to libel and

defamation suit is whether the claim is true or not.

**WA:** On June 16, 2000, some 45 Hispanic prisoners at the Washington State penitentiary at Walla Walla were involved in a fistfight that left prisoner Miguel Cortes, 22, with serious head injuries. Guards fired 10 warning shots to quell the melee. The prison was locked down until June 19, 2000, as prison officials purported to investigate the cause of the fight.

**WI:** On June 23, 2000, sergeant Jason Sorenson broke into a locked cabinet at the Racine Youthful Offenders Correction Facility, took a shotgun, barricaded himself in a bathroom and shot himself to death. Two months earlier, Nick Sheller, another guard at the prison and a friend of Sorenson, committed suicide with Sorenson's pistol. No reason was given for either death.

**WI:** On July 10, 2000, Emily Lewandowski, 30, a DOC probation officer, was charged in Milwaukee circuit court with one count of misconduct in public office. Lewandowski is accused of forging the signature of probationer Andrew Elem to documents extending his probation. Elem later had his probation revoked and spent six months in prison. No motive has been given for the forgery. ■

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## No Qualified Immunity from ETS Exposure

The U.S. court of appeals for the Second Circuit held that it was clearly established after *Helling v. McKinney*, 509 U.S. 25 (1993), that prison officials could not be deliberately indifferent to exposure of prisoners to levels of environmental tobacco smoke (ETS) that posed an unreasonable risk of harm to their future health, without violating the Eighth Amendment.

This case began two months after *Helling*, when three Sing Sing prisoners brought suit, pursuant to 42 U.S.C. § 1983, in federal court, alleging they were being subjected to cruel and unusual punishment through ETS exposure. Their *pro se* amended complaint claimed that high levels of ETS in their cells and in common areas were the result of poor ventilation, and poorly conceived and under-enforced smoking regulations.

The defendants, five NY DOCS officials, moved for summary judgment on two grounds: (1) exposure to ETS does not violate the Eighth Amendment, and (2), even if it does, they would be entitled to quali-

fied immunity. After appointing counsel for the prisoners, summary judgment was denied and the parties were directed to complete discovery. *Warren v. Keane*, 937 F.Supp. 301 (SDNY 1996) [PLN July 1997].

After discovery, prison officials renewed their motion for summary judgment on the issue of qualified immunity, on the theory that intervening case law, and facts developed through discovery, bolster their position. After oral argument, the court denied the motion, and prison officials filed an interlocutory appeal.

On appeal, prison officials argued that the right at issue could only be established with sufficient clarity if the facts were narrowly defined to mirror the factual scenario of *Helling*. However, the appellate court rejected this rationale.

The court recognized that even if a prisoner "shows no serious current symptoms," quoting *Helling*, prison officials could not "expose him to levels of ETS that pose an unreasonable risk of serious damage to his future health." The court implicitly held that the right at stake was

not the narrow right to be free from exposure to ETS, "but the broader 'right to be free from deliberate indifference to serious medical needs.'"

In the alternative, prison officials argued that even if the right was clearly established, their actions were "reasonable." Citing Sing Sing Policy and Procedure 104, which notes "the health risks associated with smoking are well-documented," the court rejected this contention.

The court concluded that the facts remain in dispute. If the prisoners' allegations are believed, as they must on summary judgment, they "overwhelmingly" describe an "environment permeated with smoke resulting from, *inter alia*, under-enforcement of inadequate smoking rules, overcrowding of inmates and poor ventilation." The decision to deny qualified immunity was affirmed, and the costs of appeal were taxed against the prison officials. *Warren v. Keane*, 196 F.3d 330 (2nd Cir. 1999). ■

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## Two Guards Killed During Botched Missouri Jail Escape

On June 22, 2000, a man and a woman rang the night bell of small county jail in Huntsville, Missouri, and when they were let in gunned down two guards in a botched attempt to spring a friend who was detained at the jail.

After killing the two guards, who were unarmed, the two searched for the key to open their friend's cell but couldn't find it and fled, authorities said.

Guards Leon Egley, 33, a Huntsville city councilman and jail supervisor, and Jason Acton, 36, a jail guard on the job for two months, were both shot repeatedly with a pistol.

Suspects Michael Tisius, 19, and Tracie Bulington, 27, were captured unarmed about nine hours later after being spotted walking along a highway 130 miles away. Both have been charged with murder.

Authorities said the suspects were trying to free Bulington's boyfriend, Roy Vance, who had recently been transferred

from the Macon County Jail after an attempted escape. Vance had been in the Macon jail 15 times on drug and property damage charges. Bulington had been in and out of jail on charges including drug offenses, authorities said.

Randolph County Sheriff Don Ancell said jailers routinely let people in to the jail unless they look dangerous.

"People stop in at all hours," he told *The Associated Press*. "If they're not standing there with a gun in their hand, they let them in."

After the shooting, the jail's 36 prisoners were moved to other jails. Ancell said he will keep the jail shut until a bulletproof barrier can be installed.

Egley and other community members had been pushing for a new jail with increased security. Voters have repeatedly defeated ballot measures to pay for a new jail, most recently in November. ■

Source: *The Associated Press*

## Race-Based Religious Policy Violates Equal Protection Clause

A federal district court in Virginia held that a race-based prison policy preventing non-Native American prisoners from obtaining Native American spiritual items violated the Equal Protection Clause. The court issued an injunction enjoining the application of the policy, based solely on race.

Thomas Mitchell, Jr., a white, non-Native American prisoner of the Virginia Department of Corrections, (VDOC), sued prison officials, claiming that a prison policy which prohibited him from obtaining Native American spiritual items violated the First Amendment and the Equal Protection Clause.

Mitchell asserted that his religion is based upon Native American spiritual practices. He requested approval to purchase herbs and an abalone shell but his request was denied "until he could prove he was a Native American."

Under the VDOC policy, Native American prisoners were entitled to acquire these items but prison officials refused to entertain requests for these items by prisoners

of any other race. Regardless of the sincerity of a prisoner's faith in Native American spiritual practices, non-Native American prisoners were precluded from obtaining these items.

Applying *Turner v. Safely*, 482 U.S. 78, 107 S.Ct. 2254 (1987), the court held that this race-based exemption policy was not reasonably related to legitimate safety and security concerns. Accordingly, the court issued an injunction enjoining defendants from precluding Mitchell from acquiring the requested items "solely on the basis of his lack of membership in the Native American race."

The Court rejected Mitchell's First Amendment claim, holding that he "utterly failed to carry his burden of proving" such a violation. He offered no evidence establishing: the tenets of his religion; that he sincerely believes those tenets; that any of the requested items are necessary to perform a ceremony basic to his religious beliefs; or that the challenged policy prevented him from practicing his religion. See: *Mitchell v. Angelone*, 82 F.Supp.2d 485 (E.D.Va. 1999). ■

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# PRISON

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### The Penal System and the U.S. Labor Market

*Bruce Western, Princeton University  
Kathy Beckett, Indiana University*

The low rate of U.S. unemployment contrasts strikingly with very high levels of joblessness in Europe. Official statistics show that U.S. unemployment is now around 4% while European unemployment is over 10% and has been persistently high throughout the 1980s and 1990s. Policymakers and analysts often attribute low unemployment in the United States to a highly unregulated labor market in which there is very little state intervention. In Eu-

rope, on the other hand, governments negotiate with unions and employers in setting wages, and welfare states provide generous benefits for unemployment, training, health care and education. Without these institutional protections, so the theory goes, wages are allowed to fall to a level at which everyone can find work and indeed everyone must look for work because government assistance is so meager. In Europe, wages are rigid and unemployed workers don't have incentives to seek work because of the generous welfare benefits at their disposal. In short, the American model of market deregulation has apparently generated low unemployment and the European case stands as the cautionary counter-example.

The estimates of unemployment upon which these arguments rest do not include the prison and jail population, which in the U.S. is now estimated at more than 2 million. Our research suggests that when this population (comprised mostly of young, able-bodied men) is included in estimates of unemployment and joblessness, European rates of unemployment are actually lower than those in the United States for eighteen of the twenty years between 1975-1995. These adjusted figures also show that unemployment rates among African-American men have not improved much since the recession of the early eighties. Thus it appears that apparently low rates of unemployment in the

United States are in part due to the dramatic expansion of its penal system.

#### **Industrial Relations and the Welfare State**

It is often observed that the United States lags far behind Western Europe in industrial relations policy and welfare state development. The comparative weakness of U.S. industrial relations is illustrated by statistics on collective bargaining coverage. While the wages of most European workers are set by some kind of collective agreement, fewer than twenty percent of American workers have union representation. Social policy is also less developed in the United States. Approximately one-quarter of the gross domestic product (GDP) of the large European countries is devoted to public spending on health, education, and welfare. In the United States, social spending accounts for only 15% of GDP. In areas that are related specifically to employment, only about one-third of U.S. workers are covered by unemployment benefits in contrast to nearly all European workers. The United States also spends less than a quarter of the European average on active labor market policies that train and mobilize workers into jobs. In short, traditional indicators of government intervention show the U.S. government only weakly regulates its labor market in comparison to the extensive state institutions of Europe.

### Inside

NH Prisoner Voting Rights	5
Habeas Hints	6
OH Prison Food Contract	8
Federal Execution Postponed	9
NY Jail Guards Convicted	10
PLRA Attorney Fees	12
BOP Uprisings	16
NJ Parole Chief Resigns	18
OK Private Prison Fined	19
PLRA Exhaustion	22
Family Wins \$12.9 Million	24
From the Editor	26
News in Brief	27

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## Labor Market, con't.

### Penal Institutions and the Labor Market

Although welfare and industrial relations statistics do illustrate the weakness of social protection mechanisms in the United States, this does not justify the claim that market principles alone drive the superior U.S. employment record. Labor markets are embedded in and affected by a wide array of social arrangements that extend beyond the regulative mechanisms of the welfare state. In the United States, for example, market deregulation and welfare state retrenchment have been accompanied by rapid expansion of the criminal justice system. At the peak of the recession of the early 1990's, criminal justice spending exceeded \$91 billion, dwarfing the \$41 billion spent on all unemployment benefits and employment-related services. By 1992, the public cost of correctional facilities totaled more than \$31 billion and by 1996, 1.63 million people were being detained in American prisons and jails (Gilliard and Beck, 1997). This was a significant and costly state intervention comparable in size to the large social programs of European welfare states. Indeed, due to low levels of unemployment insurance coverage, more American men were incarcerated than received unemployment benefits in 1995.

U.S. incarceration rates are even more striking when compared to those of other industrialized democracies. In 1993, the U.S. incarceration rate was 5 to 10 times greater than other OECD (Organization for Economic Cooperation and Development) countries. These high rates correspond to large absolute numbers. In the United States, prison and jail inmates are counted in the millions. In European countries, prison populations number in the tens of thousands.

### The Short-term Effect of Incarceration on Unemployment

By moving more than one million able-bodied men of working age into prisons and jails, U.S. criminal justice policy has had profound effects on estimates of employment trends. Because they are institutionalized, prisoners are not counted by population surveys as members of the civilian labor force, or even among those "not in the labor force." In

the short-term, then, incarceration lowers conventional unemployment measures by removing significant numbers of able-bodied men from estimates of joblessness. These labor market statistics therefore give a falsely optimistic picture of labor utilization when incarceration rates are high. To remedy this limitation, we analyze unemployment trends that take account of the size of the incarcerated population. This may even be a conservative strategy for assessing the short-term effect of incarceration on employment because it ignores the job-creating effect of the penal system.

To assess the short-term effect of incarceration we distinguish two unemployment statistics. First, the usual unemployment rate is just the number of unemployed as a percentage of the total labor force—the unemployed plus those employed. Second, we can account for the incarcerated population by simply adding them to the total jobless count and to the figure for the total labor force. This incarceration-adjusted unemployment rate can be interpreted as either a more general measure of joblessness than the conventional unemployment rate, or a measure of the causal effect of incarceration. In this causal interpretation, adjusted unemployment—which includes prison and jail inmates among the jobless—describes what the unemployment rate would be if the incarceration rate were zero. The importance of incarceration as a source of hidden unemployment varies by sex and across countries. More than 90% of prison and jail inmates are male in the United States, so we focus on trends in the labor market conditions of men. From a comparative perspective, the short-term effect of incarceration is tiny in Europe because incarceration rates are so low. In most European countries, unemployed males outnumber male prison inmates by between 10 and 20 to 1. In the United States in 1995 this ratio has fallen to just under 2.2 to 1. Differences between the United States and Europe are also reflected in the relative size of the conventional unemployment rate and the adjusted figure that includes the incarcerated. In most European countries, counting prisoners in estimates of unemployment only changes the unemployment rate by a few tenths of a percentage point. By contrast, prison and jail inmates in the United States added

1.5 points to the usual unemployment rate in 1990 and over 2 points by 1994.

Conventional estimates of U.S. and average European unemployment suggest that unemployment in the United States peaked in 1983 at about 10%, rose again in the early nineties, but recovered fairly quickly after each of these recessions. Although European unemployment rates were low compared to the United States until 1984, estimates of unemployment suggest that recovery from the recessions of the mid-eighties and early nineties in Europe was relatively weak.

However, employment performance in the United States looks less impressive once we take the size of the prison and jail population into account. An adjusted estimate that adds prisoners to the male unemployment count shows that labor market inactivity in the United States never fell below about 7% in the 1980's. By 1994, the prison and jail population had become so large that it added about 2 percentage points to the male unemployment rate. These modified estimates suggest that unemployment in the economically buoyant period of the mid-1990's was about 8%, higher than any conventional U.S. unemployment rate since the recession of the early 1980's.

A more detailed examination of the U.S. data allows us to specify the impact of incarceration on the labor market experiences of black and white men. In 1983, when the prison population is added to the unemployment count, the resulting unemployment rate for all men is just 1 percentage point higher. However, estimates of unemployment among black men in 1983 increase by 4 points to 23%. The effect of incarceration on white male unemployment is smaller, raising the unemployment rate by only about half a percentage point. As the prison population grew through the 1980's, the labor market effects of incarceration become much larger. For all men, average unemployment in the 1990's is lifted to nearly 8%. When we include the incarcerated population in estimates of black unemployment we find that nearly 1 in 5 African-American men were without a job throughout the 1990's. Incarceration has a similar effect on estimates of black joblessness, a category that includes those no longer looking for work.

In sum, the growth of U.S. incarceration through the 1980's and 1990's conceals a high rate of persistent unemployment and joblessness. Adjusted unemployment figures that include the incarcerated population suggest the United States labor market has performed worse, not better, than European labor markets for much of the past two decades. Incarceration has particularly strong effects on estimates of black unemployment: when prisoners are added to jobless statistics, rates of joblessness among black men have remained around 40%. (It should be noted that only approximately 5% of prisoners in the U.S. worked in 1996 producing goods or services for external consumption.)

#### **The Long-Term Effect of Incarceration on Unemployment**

Thus it appears that by removing large numbers of men from the labor force count, incarceration artificially lowers the usual figures for labor inactivity. At the same time, it is likely that the expansion of prisons and jails will increase unemployment in the long run. Research suggests that job applicants with no criminal record are far better off than demographically similar persons who were convicted and incarcerated. While convicts who acquire educational and vocational skills in prison are able to improve their chances of employment (Irwin and Austin 1994), resources for education and vocational training in prisons and jails have declined in both absolute and relative terms, and the recent decision to deny prisoners Pell grants to pursue higher education suggests that this trend is likely to continue in the future.

Our analysis of data from the National Longitudinal Study of Youth (NLSY) supports the argument that incarceration increases the likelihood of future joblessness. The results of this analysis indicate that youth incarceration reduces annual employment by about 5 percentage points, or about 3 weeks per year, controlling for education, work experience and local labor market conditions. The effect is larger for blacks, whose employment is reduced by about 8 percentage points (more than 4 weeks in the year) by juvenile incarceration. In fact, the effects of youth incarceration on adult employment are larger than failure to graduate from high school or living in a high unemployment area. Even after

fifteen years, respondents who were incarcerated as juveniles worked between 5 and 10 percentage points less than their counterparts who did not experience incarceration. The effects of adult incarceration on employment status are even greater, reducing employment by about one fifth or about 10 weeks per year. A wide variety of models thus strongly supported the conclusion that incarceration has large and extremely long-lasting effects on the job prospects of ex-convicts.

#### **Conclusion**

Comparative labor market research and recent policy debates attribute low levels of unemployment in the United States to an ostensibly de-regulated labor market. In contrast, our research suggests that the U.S. has made a significant intervention in the labor market by expanding the penal system in the 1980's and 1990's. As a result of the policies associated with the wars on crime and drugs, prisons and jails grew to detain around 1.6 million people by 1995. Consisting mostly of young, unskilled, able-bodied men of working age, these large prison and jail populations conceal a high level of joblessness that, if included in labor market statistics, would contribute about 2 percentage points to the male unemployment rate by the mid-1990's. These effects are especially strong for African-Americans: labor inactivity is understated by about two-thirds, or 7 percentage points, by the conventional measure of black male unemployment. Despite claims of "Eurosclerosis" and the successful deregulation of the U.S. labor market, our revised estimates show that unemployment in the United States exceeded average European rates for all years between 1975 and 1993.

While incarceration has the immediate effect of lowering conventional estimates of joblessness and unemployment, it significantly increases the chances of unemployment among ex-convicts. With over two million men currently in prison or jail, current levels of incarceration annually generate the equivalent of a full year of unemployment for more than 400,000 American men. In the aggregate, then, it appears that the high U.S. incarceration rate will greatly reduce the productivity and employment of the male workforce.

## Labor Market, con't.

How can these findings be reconciled? If incarceration lowers conventional measures of joblessness in the short-term but increases unemployment in the long-term, why does the U.S. labor market still perform well according to conventional indicators? The steady expansion of the prison and jail population combined with high rates of recidivism and re-incarceration helps to explain this paradox. About two-thirds of young state prisoners are re-arrested within three years, removing many of those at risk of unemployment from the labor force. With high rates of recidivism and intensified surveillance of ex-convicts, the short-term negative effect of incarceration on unemployment dominates the long-term positive effect. Under these conditions, the appearance of strong employment performance has been assisted by an ever increasing correctional population.

It has been argued that some European welfare states may also conceal unemployment. However, the dangers of U.S. prison expansion are significantly greater than those posed by European welfare policies. In contrast to welfare institutions, the penal system has unambiguously negative effects on the job prospects of its clients. While many job training programs and employment related services expand human capital and strengthen social networks, incarceration devastates the market power and productive capacity of potential workers. Moreover, penal expansion exacerbates rather than alleviates racial and class inequalities. In sum, the massive expansion of the penal system is a uniquely American mode of state intervention that improves conventional indicators of labor market performance in the short-term—but will exact a high social cost in the long run. While some policy analysts celebrate the free market principles of the U.S. model, these same principles should be assessed in light of the significant and coercive reallocation of labor through the expansion of American prisons and jails.

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**[Editor's Note:** This article outlines the impact of mass imprisonment on the U.S. labor market. However, the paper actually understates the impact of mass imprisonment because it only focuses on half the equation, the prisoners who are locked up. Also impacting the job market are the people who are hired to guard and contain the prisoners. Recent Bureau of Justice statistics indicate that at least 600,000 people are directly employed by prison systems. If it were not for mass imprisonment this is a large work force that would either have to be employed elsewhere or would find itself unemployed. If people indirectly employed by prison systems are included, the impact is even higher. This includes the construction workers who build prisons, medical contractors, prison bureaucrats, etc.

Staffing levels in prison systems vary, but Washington state has roughly 15,000 prisoners and its Department of Corrections employs about 7,400 people. This results in hiring one prison employee for every two prisoners received into custody. If the authors' analysis had encompassed people employed by prisons and jails, the labor market impact of mass imprisonment would be even higher. Not a part of the study, but also relevant, is the fact that the U.S. maintains a large military of some 1.4 million people. Most European countries have small armies and small prison populations. If the U.S. had a military proportionate to that of other countries its unemployment figures would also be higher. The subject of another article, but there is a direct correlation between global capitalism, mass imprisonment and a large military force.] ■

## Massachusetts Prisoners' Political Action Committee Floundering

Massachusetts prisoners were set back in their electoral efforts when the formation of a political action committee (PAC) inside the walls of the Massachusetts Correctional Institution was banned by executive order of Republican Governor Paul Cellucci. Guards confiscated the prisoners' political materials and put the prisoners in solitary confinement. Prison administrators and politicians alike fear that prisoner political empowerment will spell doom for the house of cards they have constructed. Not only do they fear the potential dismantling of the nation's prison systems but also the total collapse of the American capitalist system. Such hysterics, unfortunately, are totally unfounded.

PLN has previously reported on the organizational efforts by the Massachusetts Prisoners Association PAC. Unhappy with that state's laws which allow prisoners to vote, Cellucci has also proposed an amendment to Massachusetts' constitution that would disenfranchise prisoners.

Prison activists are fighting Cellucci's initiative. No matter what happens, prisoners will likely remain outside the political system, says Dave Elvin, a prisoners' rights activist who represented the prisoners' PAC on the outside. The \$243 collected by the PAC languishes in a bank account and its prisoner founders are laying low. "Nobody was interested in us, not even progressives," Mr. Elvin said.

In the final analysis, there is little variance in the reactionary aspects between tweedle-dee and tweedle-dum candidates. Perhaps the rightward shift of the entire American political process is the culprit that lies behind the refusal of the majority of voting-age Americans to participate in the electoral charades. Maybe in that respect prisoners should stick with the majority and ask themselves what value there really is in fighting for the right to vote when there is nobody to vote for. ■

# NH Supreme Court Overturns Prisoner Voting Rights

*By Ronald Young*

As previously reported in *PLN*, New Hampshire state prisoner David J. Fischer successfully litigated the right of New Hampshire prisoners to cast absentee ballots in local, state, and federal elections. Fischer alleged that legislation prohibiting felons from voting violated his right to vote under Part I, Article 11 of the New Hampshire Constitution. The lower Superior Court agreed and declared the disenfranchisement statutes unconstitutional. It ordered local election officials to allow Fischer and others similarly situated to register and vote in the next election.

Naturally the state appealed the decision to the New Hampshire Supreme Court. It reversed the lower court decision after the state successfully argued that the New Hampshire legislature has constitutional authority under Article 11 to determine voter qualifications and that the legislature reasonably excluded incarcerated felons from the franchise.

After a review of Article 11, its constitutional history, and legislation pertinent to the historical right of felons to vote, the state justices concluded that the legislature retains the authority under Article 11 to determine voter qualifications and that the felon disenfranchisement statutes are a reasonable exercise of legislative authority.

The state argued that from its inception, Article 11 has always provided the legislature with the authority to determine voter qualifications. Although acknowledging that Article 11 has been amended over the years to remove certain qualifications from the legislature's purview, the state asserted that the legislature's underlying constitutional authority to identify qualified voters has never been altered.

Fischer, on the other hand, contended that Article 11 as presently crafted is plain on its face and grants the right to vote to all inhabitants who are at least eighteen years old, excepting only persons convicted of three enumerated offenses: treason, bribery, and willful violation of state or federal election laws. Fischer acknowledged that the legislature previously had the power under Article 11 to determine voter qualifications, but asserted that a 1974 constitutional amendment removed that authority from Article 11.

The high court examined the history of Article 11 and found that at its inception in 1784 the language of the article was broad, granting the right to vote and to be elected to all inhabitants of New Hampshire with "proper qualifications." By this the justices concluded that because "proper qualifications" was defined neither in Article 11 nor in the state constitution itself, the legislature necessarily had the constitutional authority to define its scope.

The "proper qualifications" language remained part of Article 11 through many amended versions until it disappeared after voters approved another amended version of Article 11 in 1974. The court agreed that a fair reading of Article 11 in its present form would not support allowing the legislature to define voter qualifications. It also found, however, that the removal of the "proper qualifications" language from the voting provision did not conform to the scope of the amendment intended by the constitutional convention. Specifically, it did not relate to the original four intended substantive changes regarding age, domicile, duties of the secretary of state, and absentee voting, and far exceeded the convention's remaining intent to simplify the wording of Article 11.

Therefore, the New Hampshire Supreme Court concluded that the ballot questionnaire submitted to the citizens for ratification of the 1974 amendment failed to alert voters to any substantive change to the legislature's authority to generally determine voter qualifications.

Using this convoluted process of reasoning, the state justices concluded that Article 11 was not properly amended to cause the removal of "proper qualifications" from the voting clause, and the legislature still has authority to define proper qualifications of voters, including the qualifications required by the felon disenfranchisement statutes.

Fischer maintains that no one should be afraid of prisoners who go to the polls. "We are no more likely to band together than anyone else," he said. Fischer drove home his point when he divulged that he cast his ballot for reactionary Republican Alan Keyes in the presidential primary held earlier this year. Aside from that, prisoner turnout has been abysmal, largely because of a daunting registration process. See: *Fischer v. Governor*, No. 98-695, NH Supreme Court. ■

# Habeas Hints

*by Kent Russell*

This column is intended to provide “habeas hints” for prisoners who are considering or handling habeas corpus petitions as their own attorneys (“in pro per”). The focus of the column is habeas corpus practice under the AEDPA - the 1996 habeas corpus law which now governs habeas corpus practice throughout the U. S.

## **1. If you have any doubt about whether the AEDPA statute of limitations is about to run out or has run out, file a “protective” state habeas corpus petition ASAP.**

In my book I stress the need to file a state habeas corpus petition within the one-year period of limitations that applies under the AEDPA, because only by complying in advance with the AEDPA limitations period can a prisoner exhaust his state remedies and still have time left to apply for federal habeas corpus in the likely event that state habeas corpus relief is denied. This means that any prisoner who is eventually planning on seeking habeas corpus relief should file a state habeas corpus petition at least a few days prior to the expiration of one year from the date that a prisoner’s conviction becomes final on direct appeal, and should begin drafting his federal petition during the last stage of review on state habeas corpus. So, for example, a state prisoner (“Joe”) whose conviction became final on October 1, 1999, should file a state habeas corpus petition in the state superior (trial) court where he was convicted no later than September 20, 2000, which would still give Joe 10 days left in his AEDPA statute of limitations “bank”. If the petition is denied by the superior court it should be filed promptly in the state appellate court, and if denied there it must then be filed in the state’s highest (“supreme”) court. Assuming denial by the state supreme court, Joe will have 10 days after that denial within which to file his federal habeas corpus petition. That isn’t much time, but it will be enough, especially if Joe starts preparing his federal petition during the weeks or months the state habeas corpus petition is pending in the state supreme court.

OK in theory, you say, but what if that’s not possible through no fault of Joe’s? What if Joe’s trial and/or appellate attorneys never explained the AEDPA statute of limitations to him, or if his previous attorneys dragged their feet so much that Joe now becomes aware that the AEDPA statute of limitations either has run out already or is going to run out in the near future, but no state habeas corpus petition has been filed yet on Joe’s behalf?

My advice when this situation arises is to file a “protective” state habeas corpus petition as soon as possible in the state superior court. That way, if the statute of limitations has not run out yet, it will stop the statute of limitations from running. Alternatively, if the statute of limitations has already run because of attorney error or neglect, it will give the prisoner a chance to explain the reason for the delay as soon as possible, and hopefully establish the “cause and prejudice” that is required for the delay to be excused.

## **2. When filing a protective petition, filing fast is the most important consideration, so use an approach that touches all the necessary bases without getting bogged down in extraneous details.**

If you have reached the point where it’s necessary to file a protective petition to keep the statute of limitations from running, then by definition you are rapidly running out of time. That means that you don’t have the luxury of carefully pondering what you are going to file, doing further investigation and research, or writing letters complaining about your situation. Instead, you have to FILE and you have to file FAST. Naturally, this means that meticulous preparation and drafting – which is fine if you have the time, but impossible if you don’t – has to give way to a more basic approach that sacrifices detail in favor of making sure you touch all the bases necessary to produce a “properly filed” petition as quickly as possible.

For those of you who find yourselves under the statute of limitations gun, here are some hints to assist you in

quickly filing a simple, protective petition:

- **Get the required printed form.**

You will need the printed form that the court requires for filing a habeas corpus petition. (In California, the form that must be used for state habeas corpus is the “Petition for Writ of Habeas Corpus, #MC-275.”) The form is available for free in every courthouse. If you have time, write to the courthouse where you were convicted and ask for the form to be sent to you. If not, then have a friend or family member go to the courthouse and get one for you. (In my experience, on-line habeas corpus forms are now available free for almost all federal district courts, but not necessarily for all the state courts.)

- **Provide all the historical information requested on the printed form.**

All habeas corpus forms require basic historical information about the conviction and sentence in addition to the actual statement of the habeas corpus “claim.” (See CA form Q. 15.) The type of information required includes the nature of the charges, length of sentence, court where convicted, etc. All this information is readily available from the briefs on appeal and/or from the court opinion affirming the conviction on direct appeal. All applicable questions must be answered as accurately as possible.

- **If the AEDPA statute of limitations has already run, explain why you filed late.**

On almost every habeas corpus form there will be a question asking you to explain any delay in filing. Questions about delay give you the opportunity and the duty to explain exactly why you are filing later than you should be. Sometimes the reason is late discovery of the facts. More commonly, however, the reason has to do with ignorance by previous counsel about the AEDPA statute of limitations, or indifference or delay by the lawyer in explaining to the prisoner the need to file a state habeas corpus petition within a year of the date the conviction becomes final. Whatever the reason for the delay, be sure to explain it factually. For example: “I was represented

## Habeas Hints, con't.

by counsel X at trial and by Y on appeal but my attorneys never advised me of the requirement that a state habeas petition be filed within one year of conviction, nor did I know this from any other source until Z date when ... [explain what you learned, how you learned it, and that you filed your petition promptly thereafter]."

• **If in doubt about what "Claim" to assert, consider first a basic claim for ineffectiveness of counsel.**

Each habeas corpus case is unique, and selecting and framing a "claim" for habeas corpus requires a thorough understanding of the facts and a knowledge of the applicable law that is far beyond the scope of this column. On the other hand, when considering a protective claim that can quickly be drafted to touch the necessary bases, ineffectiveness of counsel usually fits the bill because: (1) Ineffectiveness of counsel claims are almost always based on facts occurring outside the record on appeal, and are therefore "favored" on habeas corpus; by contrast, most other claims are based on facts occurring at trial or in the appellate record and therefore must be raised on appeal or they are "waived" (lost by default). (2) If a prisoner has a valid constitutional claim that would have resulted in a finding of innocence or a lesser sentence, in theory that claim should have been raised at trial and on appeal and been successful there. Conversely, if the claim wasn't raised before, that's a pretty good indication that previous counsel was "ineffective" in failing to raise it.

These factors make ineffectiveness of counsel claims the "mother's milk" of habeas corpus, and as a practical matter they are almost always asserted either singly or in combination with other claims. Thus, when filing a protective petition, where simplicity and time is of the essence, one should always think first about claiming ineffectiveness of counsel.

Ineffectiveness of counsel claims fall into two basic categories: (a) deficient performance by the lawyer at trial and/or on appeal; or (b) deficient advice by a lawyer which induced a defendant to plead guilty on false pretenses. Each

of these requires a showing of "prejudice" – that is, factual allegations which show that the lawyer's deficiencies affected the outcome adversely to the petitioner. Therefore, in its most basic form, an ineffectiveness of counsel claim would involve first a general description of the type of ineffectiveness claim asserted, followed by facts which show both deficient performance and prejudice, and finally a citation to the most pertinent U.S. Supreme Court cases on which habeas corpus relief depends.

For example, where you are asked to state the "grounds" for your habeas corpus claim, a basic petition might look like this:

"Grounds for Relief" (§ 6 on the CA form) would be: "Ineffectiveness of counsel, in violation of Petitioner's rights under the 6<sup>th</sup> Amendment and the Due Process Clause, based on counsel's deficient performance and resulting prejudice in regard to \_\_\_\_\_." (The blank would be filled in either as (a) "the trial and direct appeal," or (b) "plea negotiations.")

"Supporting facts" (§ 6a on the CA form) would include factual statements specifically demonstrating the attorney's deficient performance and resulting prejudice. For example, for (a) you might state "My attorney failed to prepare, investigate, or present a defense based on \_\_\_\_\_. That failure constituted deficient performance and caused prejudice as follows: [Explain what defense you would have raised, the facts that would have supported it, and why it would probably have been successful.]" In category (b) you might allege: "My attorney incorrectly advised me of the maximum sentence I faced if I pled guilty. The attorney advised me that I faced a sentence of X years when in reality I faced a sentence of X+Y years. Had I been properly advised by my attorney of the maximum sentence I would not have pled guilty." Finally in either instance, if attorney neglect or indifference has caused you to file later than you should have, those facts should be alleged in the section provided for "supporting facts".

"Supporting cases" (§ 6b on the CA form) should be filled out as follows: In the (a) category cite *Strickland v. Washington*, 466 U.S. 668 (1984). For category (b) cite *Hill v. Lockhart*, 474 U.S. 52 (1985).

• **Sign the petition, mark it "legal mail" and direct it to the prison custodian in charge of legal filings with a note requesting that it be mailed "immediately."**

In summary, while it is always best to thoroughly investigate and research any habeas corpus claim, and to engage experienced counsel to help you if you can afford it, if you are under severe time pressure and have no money for a lawyer it is far better to quickly file a "protective" petition than to file no petition at all, or to waste precious more weeks or months agonizing over what to do. Of course, keep in mind that the above hints are generic in nature, and are not intended as legal advice on any particular case, but rather to give you an idea of how to quickly draft and file a basic, preventive petition when filing fast is of prime importance. ■

*Kent Russell specializes in criminal defense, appeals, and habeas corpus. He is the author of the "California Habeas Handbook" which explains habeas corpus and the AEDPA, and can be purchased (\$20) from the Law Offices of Russell and Russell, 2299 Sutter Street, San Francisco, CA 94115.*

ITS/  
Cheryl Dogget

# Ohio Prison Food Contract Sparks Controversy

In 1998 senior officials of the Ohio Department of Rehabilitation and Correction (DORC) were convinced that outsourcing prison food service would be the next great leap forward for Ohio penology. So they bid out a contract for private firms to provide food service at the Noble Correctional Institution. Of the two bids submitted, from ARAMARK Correctional Services of Oakbrook, Ill., and Canteen Corp. of Chicago, ARAMARK's was the lowest.

Commencing October 1, 1998, ARAMARK purchased, cooked, and dished out the food served to Noble's 2,500 captive consumers. The contract specified that ARAMARK was to be paid from \$1.24 to \$1.27 for each meal it served. That number was to be calculated from an exact count of convicts who ate at each breakfast, lunch, and dinner.

Almost immediately problems with the contract began. The profit-conscious ARAMARK served precisely measured food portions that were "substantially smaller" than those received by convicts of other state prisons, admitted Gary C. Mohr, DORC's deputy director for administration.

Within weeks Noble's then-warden Thomas Haskins and other Noble employees began complaining to officials at DORC headquarters that ARAMARK's small portions presented a big problem. Grumbling by prisoners could escalate into a riot, they warned.

Senior DORC officials ignored the complaints. Haskins said he and other Noble supervisors were told by state prison officials to "make the contract work, no matter what."

One of the problems is the contract left little leeway for ARAMARK to make a profit. Hence the smaller portions. With declining quantity and quality of food came declining attendance at meals. And because ARAMARK was paid according to the number of convicts who show up for meals, the lower attendance meant less income, which led to even tighter portion control and other cutbacks.

Prisoners boycotted some meals. At others they threw the food in protest. Something had to give, Mohr told the *Columbus Dispatch*. "We were concerned about the safety of our staff and inmates," said Mohr.

To curb the mounting hostility, state officials met in a closed-door meeting Feb. 5, 1999, and privately agreed on a new formula,

effective immediately. Instead of an exact meal count, ARAMARK's reimbursement was to be based on the prison's average daily head count. This verbal amendment was made without rebidding the contract and without signing any papers to document the revision.

Noble Correctional supervisors, who continue to keep an exact count of the number of prisoners to attend meals, report that ARAMARK through March 31, 2000, has received \$1,478,825 in additional payments because of the revised formula. That's about 63 percent above what the original contract would have paid ARAMARK. According to Noble's Deputy Warden, Howard Wilson, the additional payments could top \$2 million by the time the contract expires September 30, 2000.

Wilson says he was told by state officials to "Knock it off—leave it alone," in response to his complaints about the overpayments. Haskins says he also was threatened by DORC officials for opposing the ARAMARK deal. Haskins says David McKeen, former chief of DORC's support services division, threatened to transfer him to a less desirable desk job in Columbus if he continued complaining about the contract.

McKeen said he doesn't recall making a specific threat concerning Haskins. But he said Haskins and Wilson "were told the main office wanted this [contract to work], if they couldn't get it done, they'd find someone who could make it work."

Haskins resigned as warden and retired from DORC a month after he was threatened with a transfer. Haskins, who began his 21 year DORC career as a parole officer, remains bitter.

"I quit because I felt threatened," he told the *Columbus Dispatch*. "I wanted to end my career at DORC and leave there with my head held high. I wasn't allowed to do that."

Wilson stayed on as Noble's Deputy Warden and continued to write letters to state officials. In April, 2000, he finally kicked up enough of a fuss to get some action. Prompted by his complaints, state auditor Jim Petro launched an investigation into the propriety of the contract revision.

Prisons Director Reginald A. Wilkinson declined to comment on allegations that Wilson or Haskins was muzzled or threatened for opposing the contract. A spokesperson from Wilkinson's office confirmed that the auditor's office is conducting an investigation into the

contract revision. Wilkinson did say that he and several top aides met with representatives of the auditor's office to discuss "unorthodox issues with the contract."

William Kacmarek, an attorney for the Administrative Services Department, the state's contract-writing agency, said the verbal contract revision is legal.

A copy of the original contract obtained by the *Dispatch* states that it can be amended only if "agreed upon by the contractor and the warden." Haskins, who was still Noble's warden when the contract was changed, said that he opposed giving ARAMARK more money and never approved amending the contract.

Wilson thinks that changing the formula for paying ARAMARK is tantamount to forcing taxpayers to bail out a company that underbid a contract.

"ARAMARK has been in the business a long time," Wilson said. "They know how to bid on a contract. We're not supposed to guarantee them a profit." ■

Source: *Columbus Dispatch*

Fire Mountain Gems

# First Federal Execution Postponed

by Bill Dunne

Federal authorities announced on July 6, 2000, a plan to delay the execution of Juan Raul Garza, previously scheduled for August 5, 2000. Garza was convicted in 1993 in Brownsville, TX, of ordering three drug-related murders, for which he denies responsibility. His execution would have been the first federal execution in 37 years.

Clinton administration officials cited both lack of death penalty clemency procedures and concerns about racial and geographic disparities in imposition of the federal death penalty as reasons for the postponement. Responsibility for the delay in the clemency procedures' regulations is disputed. The White House faults the Justice Department, but Justice contends it sent draft procedures to the White House months ago. Both sides (as well as Garza's defense) agree race and geography unduly influence death penalty decisions. The role of class in death sentences was completely ignored.

The new clemency procedures for federal capital cases will allow prisoners' lawyers to make a presentation to a clemency panel. The Justice Department's Office of the Pardon attorney then makes a recommendation to the president, in whom the constitution vests sole authority to grant clemency. The regulations set no time limits on the president's decision. The full process is estimated to require 90-120 days from filing to decision. Garza's reprieve is thus likely to be at least 90 days and probably longer, considering the appointment of panelists and preparation and shuffling of documents.

According to an unreleased Justice Department report, the Federal Death Penalty Resource Project of Columbia, South Carolina, and facts widely known to anyone even vaguely familiar with the criminal justice system, federal death penalties fall grossly disproportionately on members of racial minorities. From the effective date of the federal death penalty statute in 1988, the attorney general has authorized seeking the death penalty against 199 defendants. Of those, 75% have been members of racial minorities, 52% of them black. Of the 21 prisoners currently facing federal death sentences, 14 (67%) are black, three (14%) Hispanic, three (14%) white, and one (5%) Asian. In contrast, those groups' respective representation in the population is roughly 13%, 11%, 72%, and 4%.

Geography also plays an apparent role in the decision to pursue federal death sentences. Only five federal judicial districts (out of 92) accounted for some 42% of prosecutors' requests since 1988 to pursue the death penalty (PR, EDVA, EDNY, SDNY, and MD in descending order of number of authorization requests).

Garza's lawyer, Gregory W. Wiercioch of the Texas Defender Service in Houston, characterized the situation as a "rigged lottery" in which "the color of your skin and where you purchased your ticket" determine the result. At a news conference a week before the announcement of the postponement of Garza's execution, even President Clinton acknowledged concern about "the disturbing racial composition" of federal death row and that "what your prosecution is may turn solely on where you committed your crime" (failing to acknowledge the possibility of prosecution without such commission). Those sentiments, he also said, prompted him to ask the Justice Department to undertake a review. Coming from a guy who demonstrated willingness to kill for power as governor of Arkansas by taking time off from his '92 presidential campaign to preside over executions, that argues for a longer rather than a shorter reprieve for Garza.

Vice-President Gore said the day after the announcement, "I do support the decision to put these clemency procedures in place, and pending that, to hold off on this particular case." He was, however, at pains to portray himself as a death penalty proponent and by implication disparaged the racial and geographic concerns of his boss. "I have not yet seen the evidence," he said, "that would, to me, justify a nationwide moratorium" on imposing or carrying out the federal death penalty.

Speculation is that softening public support for the death penalty amid widespread concerns about unfairness and error in its use will make it a contentious issue in the upcoming elections. Democrats would like to position themselves to excoriate Bush as an incautious executioner too bloodthirsty to be president on the basis of the speed and volume of executions during his tenure as Texas governor. Doing so will require toning down their own pro-death penalty rhetoric in favor of a more deliberate approach emphasizing fairness and caution. They will undoubtedly

be too craven to call for abolition of, or even a moratorium on, the death penalty. Liberalization rather than abolition will also let Gore both distance himself from and position himself to the right of the scandal-tainted and supposedly liberal Clinton White House. Executing Garza three months before the election with all the questions unresolved would expose the Democrats as hypocrites and deny them the death penalty challenge to Bush.

Any progress against the death penalty, especially one such as preventing the irreparable error of executing Juan Raul Garza, is positive. However, given election politics, Garza and all those similarly situated will still be in a tough spot after the election, given the "choices." ■

Sources: *New York Times*, *Wall Street Journal*, *Newsweek*

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## Nassau Jail Guards Convicted, Sentenced for Fatal Beating

Two Nassau County (NY) jail guards who fatally beat an unarmed jail detainee were sentenced May 26, 1999, to 11 years in federal prison, and a jail supervisor who tried to cover up for them received nearly 6 years.

In the July 1999 issue of *PLN* we reported that four Nassau County jail guards were arrested in May 1999 for the January 1999 fatal beating of jail detainee Thomas Pizzuto. [See: "Detainee Beaten to Death at Nassau County Jail," *PLN* July '99].

Pizzuto, 38, was a recovering heroin addict who had been receiving daily methadone treatment when he started serving 90 days for a traffic violation. After guards refused him methadone, Pizzuto began yelling. Jail guards Patrick Regnier and Edward Velazquez went to Pizzuto's cell to quiet him. They entered the cell and beat Pizzuto while another guard, Ivano Bavaro, acted as a lookout.

Thomas Pizzuto was hospitalized three days later. He died 48 hours after that from internal bleeding, a lacerated spleen, and broken ribs. His face and body were covered with bruises. From his deathbed, Pizzuto was able to whisper to his father that two jail guards beat him up.

The investigation quickly focused on Regnier and Velazquez. On May 27, 1999 they were charged in a federal indictment, along with Bavaro, the lookout, and Corporal Joseph Bergin, who was charged as an accessory for drafting and signing a false incident report (stating that Pizzuto slipped and fell in the shower).

For nearly a year the four guards proclaimed their innocence. Then, in January 2000, Bavaro admitted to U.S. Attorneys that he acted as a lookout during the fatal beating and agreed to cop a plea and testify against his fellow guards.

Soon after Bavaro cracked the "blue wall of silence," Velazquez and Regnier decided to plead guilty. They did so in a bizarre federal court session on January 12, 2000—but only after a federal judge spent 45 minutes sparring with the two to get them to admit that they intentionally assaulted Pizzuto.

More than 100 jail guards were on hand to show support as the two pleaded guilty.

When the defendants arrived, fellow guards surrounded their car and formed a human wall to prevent reporters and photographers from having any contact with them.

The Pizzuto family was forced to walk through a crowd of grim-faced jail guards to get into the courthouse, prompting the victim's mother to sob loudly as she walked into the courtroom.

"I couldn't believe that this is the world we live in, that these people are backing up murderers," Ms. Pizzuto told *New York Newsday*.

Federal judge Jacob Mishler verbally sparred with the pair for nearly an hour, trying to get them to acknowledge their guilt. At one point, an exasperated Mishler said, "If the defendants aren't ready to support the charges, I cannot accept the plea." Mishler repeatedly asked the guards if they were indeed pleading guilty to the behavior detailed in the indictment. "You say you punched him in the face?" Mishler asked Regnier. But did he do all of the other things alleged in the indictment?

"I might have fell on Mr. Pizzuto," Regnier replied.

"You say you went down the tier to 'do what you had to do,'" Mishler said, addressing Velazquez. But did he go with the intent to cause injury, as the indictment to which he was supposedly pleading guilty alleged?

There was a consultation between the defendants and their lawyers before Velazquez said yes, your honor.

Finally, after more pointed questioning by Mishler about their intention to hurt Pizzuto, the two guards admitted that they continually punched Pizzuto and that Regnier intentionally kned him several times in his back, causing the severe bruising around his spleen which later resulted in Pizzuto's death.

Peter J. Neufeld, a lawyer for the Pizzuto family, said the family had mixed feelings about the guilty plea. "On the one hand, we are grateful that the federal prosecutors have moved forward aggressively," he said. "On the other hand, it is a tragedy that for more than a decade complaints of criminal misconduct among corrections officers at that jail went unheeded."

Corporal Bergin was convicted after a short trial a week after Regnier and Velazquez pleaded guilty. All three were sentenced by Judge Mishler on May 26, 2000. Bergin received 5 years and 10 months for his role as an accessory after the fact. According to testimony at his trial, Bergin told a fellow supervisor, "You want me to write a report to cover this up? I can write something for you guys." He then wrote the "slip and fall" shower report.

In sentencing Regnier and Velazquez, Judge Mishler had to determine whether the severity of their actions was equivalent of murder, manslaughter or involuntary manslaughter. Prosecutors argued that the beating was comparable to second-degree murder, punishable by 20- or 30-year prison terms under federal sentencing guidelines. Defense lawyers argued that the pair were responsible for nothing more than involuntary manslaughter, which could have led to a sentence as short as three and a half years.

Judge Mishler took the middle position, ruling that the beating was comparable to voluntary manslaughter. "At the time of the attack, Pizzuto was an inmate, unable to flee from his attackers and possessed of the knowledge that as loud as he screamed, no inmate or correction officer would come to his assistance," the judge wrote in his sentencing memorandum. Mishler gave Regnier and Velazquez 11 years and 3 months to spend on the other side of the bars in a federal prison.

Both sides said afterward that they were unsatisfied by the sentences. "I expected more," the victim's mother told the *New York Times*. "I expected them to get what they deserved—they killed my son."

But Dennis M. Lemke, a lawyer for Mr. Velazquez, said the sentences were too long. "We're not at all satisfied," he told the *Times*. "We'll file an appeal."

The final defendant, Mr. Bavaro, was sentenced in a separate hearing a month after his former fellow jail guards were sentenced. ■

Sources: *New York Times*, *New York Newsday*

## No Immunity in Denying Kosher Diet

The court of appeals for the Second Circuit held that fact issues requiring a trial were present in a Jewish prisoner's lawsuit over the denial of a kosher diet. The court also held prison officials were not entitled to qualified immunity from money damages in this case.

Nathaniel Jackson, a black New York state prisoner, has identified himself as Jewish and participated in the New York prison system's kosher diet program since 1986. Upon transfer to a different prison, Jackson was denied a kosher diet after the prison rabbi determined Jackson was not Jewish because he was not born Jewish and he had not undergone a formal conversion process. After exhausting his administrative remedies, Jackson filed suit claiming a violation of his First, Eighth and Fourteenth amendment rights. Prison officials agreed to provide Jackson with a kosher diet pending the outcome of the suit. "Preferring to remain embroiled in this litigation, however, prison officials have refused to grant Jackson such meals in-

definitely." The district court dismissed the lawsuit, holding Jackson was not Jewish. The appeals court affirmed in part and reversed and remanded in part.

The court held that the district court erred in considering whether or not Jackson was "Jewish." Instead, the correct test was whether Jackson's religious beliefs were sincerely held. Jackson produced sufficient evidence to raise a genuine issue of material fact when he presented prison documents listing his religious preference as Jewish, showing participation in kosher diet programs at various prisons and showing he had gone without food for several days rather than violate Jewish dietary laws.

The court noted the prison official defendants had not advanced any penological interest in relegating to religious authorities the decision of whether or not a prisoner is Jewish for kosher diet purposes. "While the prison officials may assure themselves that Jackson's religious beliefs are sincerely held... they need not,

indeed cannot, determine 'the objective truth of [his] beliefs.'"

The court rejected the argument that a prisoner's religious status is best left to prison religious authorities. "We disagree because the question whether Jackson's beliefs are entitled to free exercise protection turns on whether they are 'sincerely held,' not on the 'ecclesiastical question' whether he is in fact a Jew under Judaic law. Courts are clearly competent to determine whether religious beliefs are sincerely held." The court remanded the case for the lower court to determine the sincerity of Jackson's religious beliefs.

The court held that prison officials are not entitled to qualified immunity from money damages if Jackson can establish his religious beliefs are sincerely held. The law has been clearly established for decades that prisoners must be afforded a diet consistent with their religious beliefs. Thus, if Jackson prevails at trial he will be entitled to money damages. See: *Jackson v. Mann*, 196 F.3d 316 (2nd Cir. 1999). ■

John Chu / Tele-Net

# Ninth Circuit Reverses *Madrid v. Gomez*, Adopts *Martin v. Hadix*

by Matthew T. Clarke

The Ninth Circuit has ruled that the Prison Litigation Reform Act (PLRA) attorney fees caps do not apply to work performed prior to the enactment of the PLRA, but it does apply to work performed after the enactment date.

This case involves a class-action suit by California state prisoners in Pelican Bay State Prison. After successfully suing prison officials in federal court over unconstitutional prison conditions, the plaintiffs' class counsel requested an award of attorney fees for past work and anticipated future work during the remedial phase. The district court granted the request, splitting the award up into two orders — one covering work performed prior to the enactment of the attorney fees cap in the PLRA and one covering work performed after the enactment date. Both orders were signed after the enactment date. Neither order applied the attorney fees cap. The district court reasoned that to apply the attorney fees cap to an already pending case would have a retroactive effect. The defendants appealed.

The Ninth Circuit court of appeals initially ruled that the PLRA applied to all attorney fees awarded after its enactment, regardless of when the work was performed, reversing the district court. *Madrid v. Gomez*, 150 F.3d 1030 (1998). Later, the Ninth Circuit panel withdrew its initial opinion and issued a new opinion.

In the new opinion, the panel acknowledged that the Supreme Court recently decided a case that was on point with this one. In that case, *Martin v. Hadix*, 119 S.Ct. 1998 (1999) [PLN, Oct. 1999], the Supreme Court held that the PLRA attorney fees cap applied to work performed after its enactment, but did not apply to work performed prior to its enactment regardless of when the attorney fees award order was signed. Therefore, the district court was correct in not applying the attorney fees cap to work performed prior to the PLRA's enactment, but incorrect in failing to apply it to the work performed after enactment.

The prisoners argued that the attorney fees cap violated the equal protection component of the Fifth Amendment. The Ninth Circuit admitted that the statute might be considered unconstitutional if subjected

to strict scrutiny and the prisoners argued that strict scrutiny was appropriate because the statute burdened a fundamental right—that of access to courts. However, the Ninth Circuit held that “a prisoner has no right to a high-priced attorney,” and that the “PLRA does not restrict access to the courts; at most, it restricts access to the most sought-after counsel who insist on their going rate for representation.”

The Ninth Circuit came to this inane conclusion by comparing the \$125 per hour allowed defense attorneys in capital cases with the \$305 awarded by the court in this case. However, this overlooks a fundamental difference between criminal and civil litigation. Win or lose, live or die, capital defense counsel will be paid. The attorney's fortune is not tied to that of the client. The opposite is true in traditional civil litigation. To be awarded attorney's fees, you must win the case. If you lose, you may even be stuck with paying your opponent's attorney fees. Thus, a law firm which wins half of its cases (which is not a bad percentage in prisoner litigation) is paid only half the time. This alone justifies higher fees, without even mentioning the fact that court-appointed defense attorneys are notoriously poorly compensated and often do a correspondingly poor job. Thus, the attorney fees cap does not merely separate prisoners from high-priced attorneys, it separates them from all attorneys who cannot afford to practice for free.

The Ninth Circuit went on to simply ask whether there was a rational basis for the classification. Under this minimal standard, the court concluded that the government's interest was to curtail frivolous suits and minimize the costs associated with those suits. This, of course, is equally inane. Traditionally, attorney fees were only awarded to the winning side. A frivolous suit will never be a winning suit. Prior to the PLRA, frivolous suits received no attorney's fees. After enactment of the PLRA, frivolous suits still receive no attorney's fees. Therefore, the attorney fees cap had no effect on the filing of frivolous suits. As for saving money, the losing prison systems could easily save the costs of litigation as well as the plaintiffs' attorney fees by maintaining a prison system that meets minimum constitutional stan-

dards. The fact that they choose to maintain an unconstitutional prison system and risk legal action should not insulate them from the consequences of their actions.

The purpose of the PLRA attorney fees cap was to separate prisoners' interests from those of their attorneys and make it as difficult as possible for prisoners to gain competent legal representation. This is because most prisoners have neither the education nor the skills to prevail in the legal system. The Ninth Circuit's ruling is a rationalization to justify the unholy purpose of rendering prisoner litigation incapable of correcting any of the gross violations of constitutional and human rights which have become a fact of everyday life in incarcerated America.

The Ninth Circuit upheld the district court's award of attorney fees for pre-PLRA work, but returned the case to the district court for the issuance of a new award order, under the PLRA attorney fees cap, for work performed after the enactment of the PLRA. See: *Madrid v. Gomez*, 190 F.3d 990 (9th Cir. 1999). ■

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## Nominal Damages Not Monetary Award Under PLRA Attorney's Fees Cap

A federal district court in Maine has held that the award of one dollar in nominal damages does not invoke the PLRA attorney's fees cap, 42 U.S.C. § 1997e(d)(2).

Raymond P. Boivin, a Maine state pre-trial detainee, sued a guard at Maine Correctional Institution-Warren under 42 U.S.C. § 1983 for placing him in a restraint chair. A jury found that the guard had violated Boivin's due process rights and awarded him one dollar in nominal damages. Boivin's attorneys, Stuart Tisdale and Mary Davis, filed a motion for award of attorney fees. Maine opposed the award claiming that attorney fees could not be granted in a nominal damages case because attorney's fees were capped by the PLRA at 150% of any monetary award.

The attorney fees provision of the PLRA requires three conditions be met with regard to attorney fees awards to prevailing prisoners: (1) the fee must be to pay for direct, reasonable services rendered in pursuing the suit – 42 U.S.C. § 1997e(d)(1)(A); (2) the fee must be proportional to the court-ordered relief – 42 U.S.C. § 1997e(d)(1)(B); and (3) whenever there is a monetary judgment, the fees may not exceed 150% of the amount

awarded – 42 U.S.C. § 1997e(d)(2). In this case, if a one dollar nominal award is a monetary judgment, the attorney's fees would be limited to \$1.50.

The court noted that this is a case of first impression with no binding or advisory precedent to go by. Considering that a holding that the attorney fees award cap provision applied to nominal damage cases "would discourage many attorneys from taking on prisoner's rights cases despite the power of even nominal damages to vindicate constitutional principles," the court found that there is "nothing in the legislative history of this provision to suggest that Congress intended this result." Therefore, the court held that nominal damages are not a monetary award within the meaning of 42 U.S.C. § 1997e(d)(2).

The court held that the attorney fees request would still be subject to the direct, reasonable services and proportionality requirements of 42 U.S.C. § 1997e(d)(1)(A) & (B). However, the court found that the attorney fees request met those requirements and it awarded the plaintiff's attorneys \$3,892.50. See: *Boivin v. Merrill*, 66 F.Supp 2d 50 (D. Me. 1999). ■

## \$100,000 Settlement in TX Restraint Chair/Pepper Spray Death

On February 22, 2000, Tarrant County, Texas agreed to pay a \$100,000 settlement to the estate of James Livingston, 30, to settle a wrongful death suit. On July 6, 1999, Livingston was arrested on a trespassing warrant. He was allegedly abusive while being booked into the Tarrant county jail. As a result, he was placed in a "restraint chair" and pepper sprayed. Jailers claim that Livingston continued to struggle with them after he was in the restraint chair until they noticed he was motionless. They did not explain how a man can "struggle" while confined in a restraint chair.

On July 7, 1999, Livingston died at the John Smith Hospital in Ft. Worth,

Texas. Livingston's estate filed suit claiming his death was due to mistreatment by jail employees. Livingston had a long history of mental illness but that did not seem to be the physical cause of his death.

Tarrant county will pay \$50,000 of the settlement and John Smith Hospital will pay the remaining \$50,000. Tarrant county commissioner Glen Whitley said, "It was a very tragic situation, and it's just good to put it behind everyone."

Apparently the maker of the restraint chair and the pepper spray manufacturer were not sued. ■

Source: *Dallas Morning News*

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## VP's Drug Dealer Still Litigating Retaliation Claim

The court of appeals for the District of Columbia circuit held that law-of-the-case doctrine foreclosed a challenge to a legal decision made at an earlier stage of the litigation and that the district court must determine whether government officials were motivated by improper intent before denying their motion for summary judgment based on qualified immunity.

In 1988, Brett Kimberlin, a federal prisoner at El Reno, Oklahoma, claimed to have sold marijuana to then-vice-presidential candidate Dan Quayle while Quayle was in law school. Thereafter, the media deluged El Reno with requests to interview Kimberlin. On three occasions, says Kimberlin, he was placed in Administrative Segregation because of his communication with the press and, on each occasion, defendant Michael Quinlan, Director of the U.S. Bureau of Prisons (BOP), interfered with his access to the press because of the content of his speech.

In 1990, Kimberlin filed a *Bivens* action in the District of Columbia alleging that BOP officials violated his First and

Fifth Amendment rights and his right of access to the press. The district court granted defendants' motion for summary judgment on Fifth Amendment claims but, on the remaining claims, denied defendants' motion for summary judgment on grounds of qualified immunity. See: *Kimberlin v. Quinlan*, 774 F. Supp 1 (DDC 1991). [PLN, Feb. 92.] Defendants appealed.

In 1993, the court of appeals for the District of Columbia circuit reversed and held the defendants were entitled to qualified immunity under a "heightened pleading standard." See: *Kimberlin v. Quinlan*, 6 F.3d 789 (DC Cir. 1993). [PLN, Feb. 94.]

In 1995, the Supreme Court granted Kimberlin's petition for review, vacated the appellate court's 1993 decision, and remanded it for further consideration. *Kimberlin v. Quinlan*, 115 S.Ct. 2552 (1995). [PLN, Sep. 95.]

In October 1998, following remand from the court of appeals, the district court denied the BOP defendants' renewed motion for summary judgment. The court held that the "law of the case" was dispositive of the qualified immunity issue because Quinlan did not challenge the district court's original judgment regarding the then clearly established law: thus the issue was settled. Once again, Quinlan appealed.

The court of appeals sustained that portion of the district court's ruling which was based on law-of-the-case doctrine: the same issue presented a second time in the same case in the same court should lead to the same result. The court of appeals also found, however, that the district court had not properly applied *Crawford-El v. Britton*, 118 S.Ct. 1584 (1998). [PLN, July 98.] In particular, the district court failed to consider if there were disputed issues of fact as to whether defendants violated clearly established law by intentionally segregating Kimberlin or interfering with his press contacts. On remand, the district court must determine if Kimberlin identified evidence to prove defendants' improper intent and whether defendants were motivated by an illegitimate purpose.

Upon resolving these questions, said the court of appeals, the district court will either issue summary judgment for defendants or proceed to hear the case on its merits at trial.

Despite due diligence by Kimberlin, the case has yet to come to trial. After ten years, Kimberlin has had ample opportunity to reflect on the wisdom of suing the Bureau of Prisons in the DC circuit. In general, the DC circuit tends to be hostile to prisoner civil rights plaintiffs. *Kimberlin v. Quinlan*, 199 F.3d 496 (DC Cir. 1999). ■

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## California Private Prison Riot

by W. Wisely

Racial brawling broke out between black and Latino prisoners at Victor Valley Community Correctional Facility March 1, 2000. Six prisoners were sent to hospitals near the Adelanto, California, medium security private prison operated by Marantha Private Corrections LLC.

Fighting began at 7:00 P.M. and allegedly ended a few minutes later, Angela Valles, Assistant Facility Director, told the *Associated Press*. However, the Adelanto Police Department reported rioting continued at 9:30 P.M. An hour and a half later, heavily armed guards from another prison nearby arrived as reinforcements.

The 500 man for-profit prison houses mostly non-violent parole violators. Emphasis there is on rehabilitation, and spokespersons deny any serious problems. Yet, in October, 1998, racial violence

broke out between some 50 prisoners, injuring three.

Five of the 10 to 15 men involved in the latest incident were expected to be transferred to Lancaster prison, according to Valles. The facility was locked-down pending an investigation. "So they can't talk to each other. That way we can investigate the incident," said Larry Kositsin, director of counseling.

Trying to downplay the situation, Valles said she wasn't sure what started the fighting, adding it may have been racial tension. "There was no riot," she said. "Riot means your whole facility burns down and there is no control. We had it under control. At no time was the community at risk." Despite those assurances, Adelanto police blocked traffic to the prison. ■

## \$50,000 to Settle CA Jail Beating Suit

In April 2000, Sacramento county paid \$50,000 to settle a prisoner's excessive force lawsuit that two Sacramento county jail guards, later fired for assaulting another prisoner, also beat him. Troyd Ransom was in the Sacramento county jail on a parole hold in February 1999, when guards Dan Berringer and Mark Clio shoved his head down during a strip search, then handcuffed him, threw him against a cell wall head first and repeatedly beat and punched him. Ransom was later taken to a local hospital for emergency treatment. The guards claimed Ransom had "provoked" the beating.

Berringer and Clio were later fired for beating another jail prisoner in a separate incident so badly that the prisoner had to have his left testicle removed. The county later settled that prisoner's lawsuit for \$600,000.

Ransom filed suit, claiming Berringer and Clio violated his rights by beating him. The jail agreed to pay Ransom \$50,000 to

settle the lawsuit and defended the settlement as "a fiscal decision." Captain David Lind, a commander at the Sacramento sheriff's office, which runs the jail, said the county settled because Ransom "had the good fortune of picking a fight with two deputies" later fired for assaulting another prisoner.

"The sad thing for the taxpayers is that this was a defensible case, except that the deputies had compromised their credibility in another case that ended their careers," Lind said. "We don't like it any better than the taxpayers." Apparently there is little concern for the taxpayers beaten and assaulted by violent jail guards. The sheriff's office had also determined that deputy Clio had lied about his role in the other attack. Ransom is incarcerated in the CDC on a parole violation. Neither of the deputies were ever prosecuted for their roles in the attacks. ■

Wilson Group

Source: *Sacramento Bee*

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# CRACK IN THE FEDERAL SCHEME:

## The October Rebellion of 1995

by Bill Dunne

Between October 19 and October 26, 1995, the U. S. Bureau of Prisons (federal prison system) experienced a series of largely spontaneous but causally related uprisings in its then 84 prison, 100,000 prisoner gulag archipelago. Involving a range of demonstrations and direct action, this widespread rebellion ignited by injustices in the imposition and execution of prison sentences was unprecedented in the history of the BOP (Bureau of Prisons). Though its participants caused no deaths, took no hostages, and breached no secure perimeter, their exclamation of discontent resulted in the first nationwide lockdown of federal penitentiaries and correctional institutions and cost \$39.7 million.

The BOP's *After Action Report: October 1995 Disturbances* seeks to ascribe the events to external factors beyond BOP control and absolve the prisonocracy of responsibility for the crisis. Officialdom specifically blames congressional refusal to reduce the gross disparity between sentences for crack cocaine and powder cocaine offenses (and media reporting thereon) for causing the revolt. The report claims there was no advance indication that any such action was likely or imminent, and no subsequent indication that internal factors of prison policy, practice, or administration played a significant role. On the basis of this assessment, the report recommends only increasing the repressive capabilities of prison authorities.

The report describes the uprising as "a series of major and minor institution disturbances." Fifty incidents, from Allenwood, PA., to Lompoc, CA., and Marianna, FL., to Sheridan, OR., were briefly mentioned, but just 10 were deemed serious enough to be "the subject of full after-action reviews" and sufficiently related to be covered in any detail in the national level report. To be sure, many of the incidents were relatively trivial as reported, but only the BOP really knows how many incidents, and of what scope and provenance, actually occurred.

The rebellion began at about 6:15 P.M. CDT on October 19, 1995, at FCI (Federal Correctional Institution) Talladega, AL. "Several hundred" prisoners assembled in the yard where many armed themselves with bats and other makeshift weapons and donned masks. From there they proceeded to essentially take

over the inside of the prison, breaking windows and setting fires throughout. Braving chemical sprays, they refused all orders to stop. Some "indicated" they were motivated by a desire to change the crack laws. The report did not say what other motivations were articulated. A half-hour after the "disturbance" began, the warden authorized firearms inside the institution. Guards and local police then confronted the prisoners with pistols, shotguns, and M-16 rifles. Many "warning" shots, gas rounds, and threats forced prisoners back into the units where more of the same forced them into the cells. By 8:00 P.M. the guards had regained control.

The insurrections at FCI Allenwood and FCI Memphis followed similar trajectories. At about 7:00 A.M. on October 20, 1995, a large group of prisoners assembled in FCI Allenwood's general compound. From there they moved to food service, housing units, and recreation areas, setting fires, breaking windows, and doing other damage. A 7:15 lockdown announcement was ignored by about 100 prisoners who continued their activities, battled guards, and encouraged other prisoners to join them. Guards with shotguns and DCT's (disturbance control teams) were then deployed. The housing units were secured and by 9:00 A.M. the yard was cleared as well.

The FCI Memphis revolt began at noon the same day. Approximately one hundred fifty to two hundred prisoners gathered on the yard, the only reason given in the report being to protest the congressional vote against rationalizing the crack laws. Another 200 in Unicor (Federal Prison Industries) refused to work, broke windows and equipment, and eventually joined the others on the yard. At about 1:00 P.M. demands were made, and rejected, for a senator, a congressperson, and media to come to the prison. By 2:45 P.M. fires in at least two units were burning out of control, Unicor had been trashed, and a BOP camera crew had been dissuaded from videotaping prisoners' actions. The command center ordered all staff members to evacuate the prison.

Then DCT's and SORT's (special operations response teams) from several other BOP facilities, plus some 200 state and local police, as well as FBI SWAT (Federal Bureau of Investigation Special Weapons and Tactics)

agents armed with pistols, shotguns, sniper rifles, submachine guns, and M-16 rifles, as well as the usual complement of noxious chemicals, counterattacked. Prisoners were herded into the gym, chapel, and Unicor and bound with plastic restraints. By 8:00 A.M. on October 21, 1995 all the fires were out and all prisoners were either subdued in locked units or shackled down on BOP busses inside the prison.

In reaction to these events, guards at all federal prisons were placed on a higher state of alert. The BOP director ordered the nationwide lockdown at 3:57 P.M. EDT on October 20, 1995. The abrasive manner in which guards imposed the lockdown, cursing prisoners and demanding they instantly lock in the cells at an unusual time without explanation, caused the FCI Greenville (IL) resistance. Verily, the manner in which the lockdown was imposed and conducted was a major contributing if not the causal factor in other incidents as well, a fact the report does not directly admit but implicitly acknowledges.

The variety in extent and character of the many subsequent skirmishes comprising the October rebellion reflected the varying degree of lockdown between institutions. The lockdown prevented any of them from becoming as extensive as those above. Nevertheless, actions ranged from serious resistance that reached multiple parts of the prisons (and included fighting, losses of control, and significant destruction), through group demonstrations (such as refusal to work, refusal to lock-up, throwing trash and projectiles, and lighting fires), to isolated and anonymous trash can fires and fixture damage. The report purports there was no retaliation against prisoners for the rebellion. Prisoners, however, tell a far different story. Hundreds did long SHU (special housing unit, aka, "the hole") time and hundreds more were transferred to more punitive prisons with little regard for what infraction they may have committed, if any. Many were beaten and otherwise abused, while in full restraints and unresisting, in the transfer process. Others were left bound and given no opportunity to wash off the various caustic chemicals with which they'd been doused for long periods. Still others were pushed and hit while bound and forced to run "gauntlets" as they were driven to housing units and SHUs. Some of

## Rebellion, con't.

the get-back came later in the form of pretextual physical abuse, harsh searches, withholding of materiel like bedding and clothing, food contamination, and destruction of personal property. Medical attention was denied or inadequate in many instances or only enough to protect prison officials from obvious liability. And over 1,400 infraction reports were written.

The report's allegation that congressional refusal to reduce crack cocaine sentences to parity with other cocaine sentences was the *sine qua non* of the whole chain of actions is disingenuous at best. It acknowledges that "immediate precipitating incidents were closely intertwined with a number of more complex underlying causes," but hammers out frequent repetitions of that one cause with astonishingly small attention to others, until it becomes the only common factor. It does acknowledge prisoner perceptions of unfairness but does not explore them, an egregious omission from a document from which effective preventive measures are to derive. Though the sentencing disparity was ample cause for discontent and unrest among its victims, the "underlying factors" were more the cause of the rebellion; the crack reduction vote was merely a precipitator. No single such factor can bear the burden of causality alone.

Among those factors constituting the critical mass for the conflagration was the following: the prison population is increasingly made up with young, black, urban victims of harsh, non-parolable sentences with little opportunity for good time. This population contrasts drastically with the aging, overwhelmingly white, largely rural, conservative prison apparatus. A sharper culture clash couldn't have been deliberately engineered. Further, in 1995, prisoners generally were reaping the results of reactionary politicians opportunistically playing the "tough on crime" card. College programs were eliminated with the abolition of Pell Grants for prisoners. Vocational training opportunities continued their long decline, especially in higher security prisons. Anti-prisoner legislation was passed which made prison conditions in federal prisons harsher. That emboldened prisonrats to treat prisoner protection rules and law as only advisory at best and make grievance resolution generally even more of a joke.

Guard brutality was also an issue. The propensity of guards to manhandle prisoners being segregated was the precipitating factor at USP (U.S. Penitentiary) Lewisburg (PA) — where it had also caused a mutiny in May 1995. Penurious health services increased suffering and insecurity and, thus, tension. Access to weightlifting and other recreational equipment was being reduced and eliminated at many prisons, as was access to cable TV. Overcrowding was another issue: all ten of the places whose revolts were detailed in the report were one-third to two-thirds over capacity, a situation characteristic of the system. Other conditions of confinement were noticeably deteriorating as well.

All such problems are internal management issues, yet the report mentions none of them and claims there were no management issues inculpated in the October events. Though the BOP attributes the worsening conditions to outside politics, in actuality it took opportunistic advantage of the politics to redistribute resources from prisoner to staff purposes. Evidence thereof is its refusal to implement the less restrictive alternatives it has in these and other operational areas.

Regarding the congressional crack vote specifically, the contention that the BOP had no idea prisoners might respond as they did is either a straight-out lie or an admission of rank incompetence. Since crack cocaine offenses receive sentences which are 100 times longer than the corresponding powder cocaine offense, legions of prisoners feel their legal recourse is no better than grasping at straws. The progress of the legislative proposal to reduce crack sentences was thus followed and discussed intensely, virtually from its introduction. The rationale for the disparity had been exposed as flawed, the disparity itself as counterproductive, and its application as so biased as to be widely regarded as racist. In apparent recognition thereof, even the U. S. Sentencing Commission recommended the reduction. Under these circumstances, many prisoners convinced themselves that congress would — had to — reduce crack penalties. Discussion of the situation was common for months prior to October 1995.

The report admits BOP intelligence-gathering about media reports and prisoner phone calls in the wake of Talledega and to taking action thereon. Also mentioned was routine phone monitoring prior to the action. Indeed, BOP staff routinely monitor all prisoner communication and activity, and talk extensively with prisoners for the purpose of developing

information on prisoner attitudes and mood and whatever else may affect prison stability. The many infractions and investigations attributable to such scrutiny attest to the surveillance. That officialdom nationwide nevertheless missed so potentially explosive an issue as one in which a large number of volatile prisoners' hopes of early release were raised to virtual belief is simply not credible.

The report's recommendations explain the BOP's claims of ignorance of the potential for trouble and its unforeseeability. In the 192 page report, there is only a single, vague recommendation to "[e]xplore alternative programming for [prisoners] to reduce idleness, in light of the fact that traditional free-time activities are being reduced," and even that bespeaks a commitment to continued reduction of "traditional activities." By making "external factors" the only reason for prisoner unrest, the BOP absolves itself of its own responsibility for creating potentially explosive tensions through its management priorities and practices, and justifies its policies of more draconian prison regimens. It legitimizes abdication of its correctional authority role in favor of that of an agency of repression.

The \$39.7 million price of the rebellion breaks down as follows: overtime, \$26.0 million; non-Unicor damage, \$7.8 million; medical, transportation (of prisoners and staff), supplies, and other administrative expenses, \$5.1 million; and lost production and orders and damage to Unicor factories, \$831,000. While nowhere near approaching the cost to prisoners, these statistics do indicate the relative importance to the BOP of its various areas of operation. [Editor's Note: In prisoner prosecutions stemming from the October uprisings, the government has claimed substantially higher amounts of property damage.]

The *After Action Report: October 1995 Disturbances* in all its disinformation splendor may be obtained from PLN. It is instructive both for a glimpse of BOP internal process and not-for-general-dissemination commentary, and for the manner in which it simultaneously reinforces the BOP organizational identification and dictates the party line to its minions and hench-people. ■

Source: *After Action Report: October 1995 Disturbances*, 10 April 1996, Federal Bureau of Prisons.

[PLN obtained the report under FOIA. Anyone desiring a copy of the report should send \$20 to PLN and specify what it is for.]

## New Jersey Parole Board Chief Resigns

The chairman of the New Jersey State Parole Board submitted his resignation July 28, 2000, as authorities neared the end of a two-year investigation into his alleged links with organized crime. A law enforcement source close to the investigation told *The Record*, the newspaper of Bergen County, that authorities will seek to indict Andrew Consovoy for official misconduct, a criminal statute that defines a violator as someone who uses his position to benefit himself financially.

The investigation centers around an alleged parole-for-pay scheme by which numerous reputed mobsters gained early release. Among those allegedly paroled under the scheme were Michael Perna, the one-time "caretaker" of the Lucchese crew in New Jersey; Samuel Corsaro, identified as a mobster in the Gambino family; and Anthony Vincent Ravo, a reputed mob associate of the Genovese family.

The anonymous source said that Consovoy also did "a favor" for an imprisoned capo in the Gambino family, Robert "Cabert" Bisiccai, although Bisiccai was not paroled. The source did not specify what favors Consovoy performed for

Bisiccai, nor how Consovoy allegedly benefited financially from the early parole scheme.

Although Consovoy is the main target of the criminal probe, authorities are also looking into the role of a low-level Department of Corrections employee, Joseph "Gus" Ferrera, whom they allege acted as a "conduit" passing the names of incarcerated mobsters to Consovoy, according to law enforcement and Parole Board sources.

**"Does he know people who are in [the mob]? Sure he does. But a guy's your friend, a guy's your friend," Consovoy said of his association with Ferrera.**

Consovoy has previously acknowledged that he and Ferrera are close friends, and that Ferrera is a cousin of Michael and Martin Teccetta, two of the top reputed mobsters in the Lucchese crime family in New Jersey.

"Does he know people who are in [the mob]? Sure he does. But a guy's your friend, a guy's your friend," Consovoy said of his association with Ferrera. "If he's involved with organized crime it's a surprise to me. If he knows people in it, it wouldn't surprise me. I make no bones about my friendship with Joe."

Joe "Gus" Ferrera must have a lot of friends in New Jersey state government. While working as a county jail guard in the late 1970s, Ferrera illegally helped Robert Spagnola, a prisoner in the Essex County Jail, come and go to meet women on the outside, and to grab pizza and fast food.

Spagnola began his criminal career as a Newark police officer and county sheriff's officer where he was caught shaking down drug dealers. He went on to run the Lucchese crime family's sports gambling operations in New Jersey.

Ferrera was convicted of official misconduct for facilitating Spagnola's illicit forays out of the county jail. He was sentenced to three years for the crime, at least two in prison without parole. Yet he was paroled after only seven months, according to prison records.

While still on parole Ferrera was hired by the state to be an "ombudsman" for the Department of Corrections. DOC officials declined to comment about the circumstances of Ferrera's 1984 hiring.

If mobsters find it easy to make parole in New Jersey, such is not the case for thousands of "unconnected" convicts. Under state law, New Jersey prisoners are guaranteed a parole hearing after serving one-third of their sentence. In May 2000, the Parole Board reported to the governor that there was a backlog of 105 prisoners awaiting this type of hearing.

In response to a class action suit, though, the state Attorney General's office found at least 2,200 and possibly as many as 2,800 cases backlogged. More than 2,000 prisoners had not had parole hearings even though they were past their eligible release dates. The Attorney General's findings raised "credibility questions" about Consovoy's earlier report to the governor.

In her statement announcing the resignation, Governor Whitman made no reference to the criminal investigation aimed at Consovoy, whom she elevated from Parole Board member to chairman in 1998. In fact, she praised his "long and distinguished career" in public service.

"Andy Consovoy has served the people of New Jersey well," Whitman said. "From his early days as a probation officer... to his service on the state Parole Board, Andy Consovoy has been a dedicated public servant."

Though he resigned at the end of July, Consovoy remains on the state payroll, receiving sick-time pay until October 1, when he officially retires.

In the closing weeks of the investigation, when it became increasingly clear that Consovoy would resign from his \$92,000 job, many of his co-workers began volunteering evidence that strengthened the state's case, said a law enforcement source. With Consovoy still at the helm, subordinates were hesitant to cooperate.

While his pal Andy Consovoy resigned, the apparently untouchable 72-year-old Joseph "Gus" Ferrera remained employed by the Department of Corrections, drawing a \$73,000 paycheck for duties which include "helping inmates prepare for parole." ■

Sources: *The Record*, *The Associated Press*

Prison Legal News

Inmate Classified

## Escape Costs Oklahoma Private Prison \$304,375

Gordon Flud's April 12, 2000, escape from a Hinton, Oklahoma rent-a-jail didn't end well for him—or for his prison. Flud, 44, jumped fences, avoided razor wire and climbed down the Great Plains Correctional Facility administration building's rainspout in his bid for freedom. But that freedom lasted only seconds, as guards nabbed him in the parking lot.

Call it the \$300,000 escape. That's what the Oklahoma Department of Corrections did when it slapped the private prison's operators with a \$304,375 penalty for alleged security breaches that allowed the escape to occur.

The 812-bed lockup is owned by The Hinton Economic Development Authority and operated by Cornell Corrections Inc. The penalty for Flud's escape, which DOC officials plan to withhold from Great Plains' state contract, is the largest assessed against an Oklahoma private prison.

The second largest was a \$168,750 forfeiture levied against the same prison in March 2000 for not meeting medical service obligations [see related article below]. The \$300,000-plus penalty amounts to roughly nine or ten days of free rent for the state, which pays Great Plains \$43.95 a day for each of the approximately 715 prisoners housed in the for-profit lockup.

"It's very exorbitant and unreasonable and, for the most part, unjustified," Great Plains warden Sam Calbone said of the fine to *The Oklahoman* newspaper.

According to a letter obtained by *The Oklahoman*, DOC official Dennis Cunningham made recommendations to Cornell Corrections to improve security after a December 1998 escape from the facility. Like the first escape 16 months before, Flud "was able to exit the facility via the administration building roof because all of the security upgrades and improvements... had not been made," Cunningham wrote.

Among the DOC requests: assign one staff member to monitor security cameras. A camera clearly recorded Flud in an off-limits area the night of his escape, which "would have been cause for immediate attention and action," the DOC letter said. But no one saw Flud's "Great Escape" on camera.

"There was an officer in the master control area," Calbone told *The Oklahoman*. "There's a bank of monitors. Of course, the officer or officers are involved in other duties besides watching these monitors."

As far as the DOC's suggestion that a full-time staff member be assigned to watch the security camera monitors, the prison's operators don't think that's necessary. Other prisons don't do it, they claim.

"We're just not familiar with anyone assigned to look at a TV monitor 24 hours a

day," said an attorney who represents the owners of the prison. "I think you could go blind doing that."

Calbone said the escapee himself is an issue because Great Plains officials had asked the Oklahoma DOC to move Flud to a higher security level in October 1999, but the state refused, the warden said.

Why? "It's because we expect them to be able to hold medium-security inmates, I would suspect," DOC spokesperson Jerry Massie quipped.

Calbone and the development authority attorney, Leroy Patton, implied the DOC may have had other reasons for levying such a large fine for the April 12 escape.

"I think there's probably some other dynamics involved that I don't care to speculate," Calbone said.

He may be referring to a DOC report in which state officials said they understood that the Great Plains facility might be negotiating to house federal prisoners instead of state prisoners, "since their per diem rate in the state of Oklahoma is presenting operating problems." The prison, about 50 miles west of Oklahoma City, housed federal prisoners at one time.

All Calbone would say was, "We're keeping our options open, of course." ■

Source: *The Oklahoman*

## OK Private Prison Fined \$168,750

On March 5, 2000, the Oklahoma Department of Corrections (DOC) fined the Great Plains Correctional Facility (GPCF) in Hinton, Oklahoma, \$168,750 for failing to provide adequate medical care to the 812 Oklahoma prisoners housed in the prison. GPCF is owned by the Hinton Economic Development Authority, a county government agency, but it is operated by Cornell Corrections, a private, for-profit prison company. GPCF is the first private prison to open in Oklahoma.

Dennis Cunningham, the Oklahoma DOC's private prison administrator, said at the time the fine was levied it was the largest ever against a private prison company in Oklahoma. The Oklahoma DOC found that the prison was not providing the medical care it was contractually ob-

ligated to provide, especially to chronically ill prisoners. Despite repeated requests, the prison never documented purported waivers of medical treatment from prisoners. The prison's medical staff was also working outside the scope of their licenses.

Cunningham said the fine amount was determined by a formula and would be withheld from payment on the GPCF contract. Both Cornell and the HEDA disputed the fine and called the DOC's action "arbitrary and capricious." They claimed the prison provides basic medical care required by the constitution. Of course, that is not the same as providing medical care required by a contract. ■

Sources: *The Associated Press*, *Tulsa World*

## PLRA Guide Available

*The Prison Litigation Reform Act: A Guide for Prisoners*, by John Boston, was previously reviewed in the November, 1999, issue of *PLN*. The booklet is now being distributed by the National Prison Project. The 32 page booklet contains a comprehensive discussion of all provisions of the PLRA and the court rulings interpreting it. The Guide is an invaluable reference to anyone involved in prison and jail litigation. Copies of the PLRA Guide are now available, \$2 for prisoners; \$30 for non-prisoners, from:

National Prison Project  
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Suite 410  
Washington, D.C. 20009  
(202)234-4830.

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**ANNOUNCEMENT**

**THOMAS E. SMOLKA AND ASSOCIATES** is proud to announce the selection of Sacramento, California as a site for an additional location at which to assist inmates on administrative, clemency, probation and parole related matters.

**Thomas E. Smolka** is a graduate of America's oldest law school, the Marshall-Wythe School of Law at the College of William & Mary. Admitted to the Virginia State Bar in 1975, he is a member of the National Association of Criminal Defense Attorneys. His legal experience includes service as a prosecutor followed by many years of private criminal law practice. Most importantly, **Mr. Smolka's** direct understanding of the American judiciary came through his own encounter with the criminal justice system, *see Smolka v. State*, 662 So.2d 1255 (Fla.5<sup>th</sup> DCA 1995, *rev. denied*, *State v. Smolka*, 668 So.2d 603 (Fla. 1996) – wherein, he was exonerated of first degree murder and released from Union Correctional, "The Rock", Raiford, FL. Mr. Smolka maintains his Virginia law practice at the state's capitol in Richmond, Virginia. Areas of Mr. Smolka's Virginia law practice include: Criminal Appellate Law, Post-Conviction Relief, Habeas Corpus, Probation, Parole, Executive Clemency, and Administrative Law involving the DOC (e.g. Interstate Compact and Institutional Transfers, Sentence Structure Analysis).

While Mr. Smolka will oversee the West Coast operation, long-time California resident **Patricia Serge-Bates** will head the Sacramento office. Ms. Serge-Bates has an extensive background in assisting inmates with such proceedings and, under Mr. Smolka's continued direction, she will focus on their individual needs. Ms. Serge-Bates, age 43, holds B.S. & M.A. Degrees, and she recently completed her doctoral course studies toward her Ph.D in Humanities at Florida State Univ. She has taught multicultural-based Humanities courses both at FSU and at FAMU. Ms. Serge-Bates is an excellent communicator with a special interest in helping misrepresented inmates to re-gain their individual rights and identities.

Given the backgrounds of **Thomas E. Smolka** and **Ms. Serge-Bates**, inmate needs will continue to be fully, and professionally pursued. Individuals desiring assistance are encouraged to contact Thomas E. Smolka and Associates as listed above.

## Wisconsin Ban on Crosses Struck Down

The court of appeals for the Seventh Circuit held that a Wisconsin prison rule banning crosses unless it was attached to a rosary violated the First amendment rights of Protestants.

This is the latest installment in a long running lawsuit over the Wisconsin Department of Corrections attempt to ban religious jewelry in its prisons. The ban on crosses was initially struck down by the district court at 891 F. Supp. 1305 and 908 F. Supp. 1429. The court held the policy violated the First amendment and the Religious Freedom Restoration Act. The state appealed and the injunction was affirmed. See: *Sasnett v. Sullivan*, 91 F.3d 1018 (7th Cir. 1996). The Supreme Court vacated and remanded the case after it held the RFRA was unconstitutional. See: *City of Boerne v. Flores*, 521 U.S. 507, 117 S.Ct. 2157 (1997). On remand, the district court upheld the ban on religious jewelry. The court of appeals reversed.

At the outset, the court held the case was not moot as the policy in question had been changed after the initial policy was enjoined. The court observed that the defendants' vigorous defense of the policy implied they would return to it in the absence of court action, which prevented the case from being deemed moot.

The court held that the standard of review in prison free exercise of religion claims is governed by *O'Lone v. Estate of Shabazz*, 482 U.S. 342, 107 S.Ct. 2400 (1987) and this was in no way changed by *Employment Division v. Smith*, 494 U.S. 872, 110 S.Ct. 1595 (1990). This is an important distinction because the court observed that a prison ban on religious jewelry would be upheld under *Smith*, "whereas under the regime *Turner-O'Lone* we would have to uphold the claim because of the feebleness of the state's safety argument..." The court held that nothing in *Smith* allows the government to pick and choose between religions,

without any justification, which is what occurred here.

The challenged rule allows Wisconsin prisoners to wear a cross only when attached to a rosary "even though the addition of a string of beads makes the ensemble more dangerous (it can be used to strangle), and no less suitable as a gang symbol, than the cross sole. The rosary is a Catholic religious device.... It is not a component of Protestant devotion. The prison authorities opined that Protestants would not be bothered by the presence of the rosary, that they could simply ignore it and concentrate on the cross, but this shows a complete ignorance of religious feeling. One might as well tell Anglicans to kiss the pope's ring but pretend he's the archbishop of Canterbury. The Wisconsin prison system, without the ghost of a reason, has decided to discriminate against Protestants, and in doing so it has violated the First amendment and must be enjoined." See: *Sasnett v. Litscher*, 197 F.3d 290 (7th Cir. 1999). ■

## HIV+ Detainee States Conditions Claim

A federal district court in Indiana held that an HIV positive detainee was entitled to a trial to resolve his claims over inhumane conditions of confinement and discrimination due to his HIV status.

Edward Roop was arrested on a warrant after arguing with a police officer. Upon being booked into the Allen County, Indiana, jail he told jailers he was HIV positive and on a medication regimen. The policeman whom Roop had argued with died of a heart attack the next day. Roop was placed in a dirty cell with no toilet or bunk for five days, then placed in a different filthy isolation cell with no bunk, toilet or shower. After four more days he was placed in an isolation cell with a bunk. Roop claimed guards purposely deprived him of sleep and his requests for water were frequently delayed, aggravating his medical condition. Roop filed suit claiming his rights to due process and under the Americans with Disabilities

Act (ADA), 42 U.S.C. § 12132 were violated.

The court denied the defendants' motion for summary judgment, holding that numerous issues of disputed fact required a trial to resolve. The court held that while no single one of the conditions Roop complained of were unconstitutional, in totality they might be. The court held these issues required a trial to resolve. The court noted that among the questions to be addressed, which could show a punitive intent by the defendants toward Roop, were why was Roop placed in isolation in the first place; why was he treated in this manner, etc.

The court also refused to grant summary judgment on Roop's ADA claim because while it was clear that he was treated differently and deprived of access to programs available to non-HIV positive detainees, it was not clear why. The case was set for trial. See: *Roop v. Squadrito*, 70 F. Supp.2d 868 (ND IN 1999). ■

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## Administrative Exhaustion Required in *Bivens* Suits

The court of appeals for the Sixth Circuit ruled that federal prisoners filing *Bivens* suits must exhaust all administrative remedies regardless of whether or not they are seeking money damages. As previously reported in *PLN*, the Fifth, Ninth and Tenth circuits have held that prisoners filing *Bivens* suits seeking only money damages are not required to exhaust administrative remedies under 42 U.S.C. §1997e(a) if the prison grievance system does not provide for money damages. The Ninth Circuit has extended this line of reasoning to include 42 U.S.C. §1983 actions by state prisoners as well.

The Eleventh and Seventh circuits have held that administrative exhaustion is required in all suits filed by prisoners, regardless of the relief sought. The Sixth Circuit has generally held that §1997e(a) requires administrative exhaustion in all suits by prisoners. This ruling further deepens the circuit split on this issue.

Paul Lavista, a legally blind, wheelchair bound federal prisoner at FMC Lexington in Kentucky, filed a *Bivens* suit against Bureau of Prisons (BOP) officials claiming they violated his rights under the Rehabilitation Act (RA), 29 U.S.C. 794(a) and the Americans with Disabilities Act (ADA), 42 U.S.C. §12101-12213, because he was denied medical care, was sexually assaulted and harassed, had his property destroyed, was retaliated against, and the prison was not equipped to care for visually impaired prisoners. The district court dismissed the suit because Lavista had not exhausted his administrative remedies under §1997e(a). The court of appeals affirmed.

Acknowledging the circuit split on this issue, the court held that all prisoners filing suit in federal court in the Sixth Circuit must exhaust their administrative remedies under §1997e(a), regardless of the relief sought and regardless of the relief available in the prison grievance

system. The court held that *McCarthy v. Madigan*, 503 U.S. 140, 112 S.Ct. 1081 (1992) [which held that federal prisoners seeking only money damages in civil rights suits against prison officials need not exhaust their administrative remedies] was overruled by the enactment of §1997e(a).

The court held that because Lavista was also seeking declaratory and injunctive relief in this case, as well as money damages, administrative exhaustion was especially appropriate. Exhaustion would give the BOP an opportunity to review its policies and procedures at BOP facilities.

The court noted that administrative remedies under the ADA and RA are immaterial. Prisoners must exhaust prison grievance systems to satisfy §1997e(a). The court held that if the BOP claimed any of Lavista's claims were time barred from the grievance system he was then free to re-file his lawsuit in federal court without exhausting the BOP grievance system. See: *Lavista v. Beelen*, 195 F.3d 254 (6th Cir. 1999).

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## Claim Exhausted When Prison Refuses Grievance Appeal

The court of appeals for the Eleventh circuit held that a Georgia prisoner had exhausted his administrative remedies as required under the Prison Litigation Reform Act (PLRA) when the prison refused to process his grievance appeal.

Tracy Miller, a paraplegic Georgia state prisoner, filed suit claiming 11 prison guards dragged him from a prison transport van and beat him in retaliation for filing grievances. He further claimed he was denied medical attention for the injuries he suffered in the beating. Miller also claimed the defendants were deliberately indifferent to his serious medical needs as an incontinent paraplegic where he was forced to lie on a concrete floor, covered in urine and feces, without a wheelchair, leg braces or physical therapy.

The district court dismissed Miller's complaint under 42 U.S.C. § 1997e(a), for

failing to exhaust his administrative remedies because he did not sign the grievance form. The appeals court reversed.

The appeals court gives a detailed description of the Georgia Department of Corrections grievance system. It notes that nowhere in its extensive policy does the Georgia DOC state that prisoners must sign the grievance form. In this case, when Miller received his grievance response, terminating the grievance, he was told he had no right to appeal the matter.

"We find that Miller was not required, in order to exhaust his administrative remedies, to file an appeal after being told unequivocally that appeal of an institution level denial was precluded. He exhausted his administrative remedies by filing the April 25, 1996 grievance form." The case was remanded for further proceedings. See: *Miller v. Tanner*, 196 F.3d 1190 (11th Cir. 1999).

# No Administrative Exhaustion Required When AG Won't Give Hearing

By Paul Wright

A federal district court in New York held that a medical indifference claim required administrative exhaustion under the Prison Litigation Reform Act (PLRA) even though money damages were not available as a remedy in the prison grievance system. After staying the suit and remanding the case for an administrative hearing, the attorney general for New York refused to comply with the court's order. The court then held no administrative remedies were available.

Felix Cruz is a New York state prisoner who claims that after he underwent surgery to repair a rupture in his abdominal wall the surgeon failed to close the wound before returning him to prison where he was placed directly in a cell with no medical examination. When the anesthetic wore off, Cruz found the wound open and bleeding. Cruz cried for help with no response from guards, at which point he collapsed in a pool of his own blood until discovered the next day.

Cruz required hospitalization and additional surgery, and spent 357 days in the prison medical center during which time he was unable to walk on his own. He was also denied a bed and bedding for two weeks.

Cruz filed suit seeking only money damages. He did not file a grievance on his medical neglect claims. The defendant prison officials successfully argued that Cruz should be required to exhaust the prison grievance system under 42 U.S.C. § 1997e(a). The court gave an extensive legislative history of the PLRA in concluding that exhaustion is required in medical neglect cases, even if money damages are not available as a remedy. The Second Circuit has yet to decide this issue.

This case provides ample illustration that prison officials and attorney generals seek to use administrative exhaustion as a hurdle to keep prisoners out of court on meritorious claims rather than to provide a meaningful administrative remedy short of litigation. In this case, prison officials successfully argued that a prisoner should be required to ex-

haust his administrative remedies before filing suit. The court agreed and ordered the state to hold an administrative hearing to determine the case and extent of plaintiff's injuries; the past and present conditions of plaintiff's confinement relating to his medical claims; whether those conditions were reasonable in light of plaintiff's medical condition, and anything that can be done to improve the plaintiff's medical condition. The administrative hearing was to be held with plaintiff's attorney participating and to be conducted on the record. The court initially held "...that New York state provides administrative remedies that are available to prevent, stop and mitigate deliberate indifference to the medical needs of prisoners. The administrative procedures still available to plaintiff also provide a fair and reliable forum in which to determine facts and responsibilities."

After the court issued its order the defendants filed a motion for reconsideration, this time arguing that the procedures the court suggested on remand "are unavailable" and cannot be constitutionally required and that Cruz's claims were time barred for the prison grievance procedure. In response, the court held that it can stay, rather than dismiss, prisoner suits that are not administratively exhausted. Further, prisoners cannot be expected to use a prison grievance system when they are still suffering the impact of the medical neglect they complain of.

The court gave a detailed discussion on why it had ordered an administrative hearing in this case, namely only after the New York Attorney General had told the court Cruz had such remedies available to him. Apparently that representation was false and made only to secure dismissal of the case.

"Under these circumstances I conclude that the administrative remedies offered under the IGP (Inmate Grievance procedure), as limited by the Attorney General, can serve no practical purpose with respect to plaintiff's allegations of completed and irreducible medical injuries. They do not provide for monetary relief; they are not intended to be adjudi-

cative in nature; they do not provide for the development of a meaningful record; and they do not allow counsel to participate. Regarding past and irreducible injuries, the IGP procedures are an empty formality, and as such are not an 'available' administrative remedy under the PLRA. Remand to the IGP at this point can serve no useful purpose, and this matter may thus proceed to discovery and trial."

Various circuit courts have held that prison grievance systems need not be effective or meaningful, simply that prisoners must jump through the hurdle of the empty formality in order to present their claims to a federal court. There is still a circuit split on the issue, until the Supreme Court resolves the matter prisoners are well advised to exhaust whatever administrative remedies they have available to them. See: *Cruz v. Jordan*, 80 F. Supp.2d 109 (SD NY 1999).

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# Family Wins \$12.9 Million Award in Michigan Jail Death Suit

*By Ronald Young*

**E**ddie B. Swans Sr., the personal representative of the estate of Edward Swans, brought a 42 U.S.C. § 1983 civil rights action against the City of Lansing, Michigan. The Chief of Police Jerome Boles, the Lansing City Jail administrator, and several Lansing police officers were named as defendants. It was alleged that Swans died as a result of excessive force and failure by the Lansing police to provide medical and psychological care to him while he was under arrest and being detained.

This case was tried before a jury in the U.S. District Court for the Western District of Michigan. The jury's verdict found for the plaintiff and awarded \$9.8 million jointly and severally against all the defendants for actual damages arising out of Edward Swans' death. The plaintiff was also awarded \$3.1 million against individual defendants for punitive damages. The court held that the damage award was not excessive and the evidence supported the verdict. The court also awarded attorney fees to the plaintiff in the amount of \$343,953.

Edward Swans was a 40-year-old, African-American man with a record of honorable service in the military and an honorable discharge with a partial service-related disability of schizophrenia. According to his family, when Swans' condition was treated with medication he functioned normally. When untreated, he did not. As a consequence, prior to the day of his fatal arrest on February 2, 1996, he had a history of hospitalizations with the Veteran's Administration and a history of arrests in the City of Lansing.

On the morning of February 2, 1996, Edward Swans appeared at the third floor of the Lansing City Jail; without shirt, socks, or coat; complaining of an assault. At the time, the weather was extremely cold with a minus 27 degree Fahrenheit wind chill. His complaint was deemed unfounded by two police officers. During this same time, Swans pleaded to go to jail but was instead given a shirt and taken to the Volunteers of America (VOA) homeless shelter. According to Steven Souza (an addiction counselor for VOA), upon Swans' entry to VOA, he reeked of alcohol, was uneasy, anxious, manic, disoriented, irrational and confused.

Swans left VOA several hours later after having waited expectantly most of the morning for a van to take him to the Veteran's Hospital in Battle Creek, though no van was

scheduled that day. At 11:00 A.M. that morning, Swans entered the King's Kids Day Care Center apparently to use their phone and warm himself. He then left the building, picked up a pickaxe and was seen talking to himself. Swans began knocking at the door of the day care center with the pickaxe. A day care worker placed a 911 call summoning police.

Officer Donald Viele, Officer David Dickson, and Detective William Debnar, in that order, arrived at the address. One of the officers responding to the call described the suspect over the radio as a "10-96," which refers to a mental patient or person who is otherwise "whacked out there."

Upon his arrival, Officer Viele stopped Swans and obtained identification from Swans' wallet. The wallet also contained a card identifying Swans as a Veteran's Administration patient and instructions to call Mrs. Swans. Swans ran and was pursued by officers who then arrested him for failing to obey a lawful order, assaulting an officer (for allegedly kicking Officer Viele), and resisting arrest. Officer Dickson described Swans as confused, disoriented and as having foam coming from his mouth.

Viele then transported Swans to the Lansing City Jail, during which time Swans "talked to God."

Upon arrival at the jail, Detention Officer Joseph Diaz attempted to book Swans at the desk. At the time, Swans was handcuffed with his hands behind his back. Swans uttered the words to the effect "you're going to shoot me" and then stood silent.

Swans was told by Officer Diaz to face either the booking counter or the cage behind him. When Swans shook his head "no," Diaz grabbed his arm and attempted to move him toward the booking counter. Jail guards Kevin Moore, William Fabijancic, and Sergeant Miklos Szilagyi then entered the booking area and, with Diaz, responded to an order from one of the officers to "take him down."

While Swans was being taken down, his foot struck Sgt. Szilagyi in the face. From that point forward, jail guard Fabijancic used, in his words, "pain compliance" techniques to subdue Swans.

According to Fabijancic, his use of these techniques was approved by his department.

A videotape showed six guards (Mezzano, Sherman, Fabijancic, Diaz, Layne and Moore) applying a kick-stop restraint to Swans while he was face-down on the floor.

The kick-stop restraint is a method of restraining a prisoner with legs and arms tied behind the prisoner's back to a strap on the prisoner's waist—in other words, hog-tying. According to the manufacturer of the kick-stop restraint system, prisoners on whom the device is used should not be placed face-down due to the risk of suffocation.

The tape shows the six guards placing their weight on Swans while he is handcuffed, tied and lying on his stomach. A large guard who was standing and supervising, Lt. Mezzano, places his foot and the weight of his body on Swans while the other guards tightly bind his feet and arms together. While all this is taking place, Swans is shown not opposing the use of force.

Then, at one point, the guards are seen cutting off Swans' pants because he had urinated. According to Plaintiff's expert, Dr. Werner Spitz, who performed an autopsy and viewed the tape, the urination indicated that Swans was in the process of dying.

After the removal of the pants, Swans is left in his urine while guards cinch the kick-stop restraint so tight that it breaks. The guards then bring in other chains and handcuffs to substitute for the kick-stop restraint. Swans is tied with these restraints and left in a cell without the guards making any careful observation of Swans' health. Swans is motionless as the guards leave the cell and throughout the remainder of the videotape.

The effect of such restraints was, according to Dr. Spitz, to cause Swans' death by asphyxiation. This finding was consistent with the finding of the Ingham County Medical Examiner, who signed the death certificate, that Swans died of cardiac dysrhythmia caused by postural asphyxia with the manner of death as restraint in police custody.

Based on this and other similar testimony, the jury returned its verdict for damages based on its findings that all of the defendants, except Viele and Szilagyi, had used force which was excessive at the direction of City policy and due to a lack of training; that all of the defendants, except Layne, had violated Swans' constitutional rights to medical and psychological care consistent with the lack of City training; that all of the defendants, except Viele and Szilagyi, had committed a battery against Swans; and that all of the defendants were grossly negligent.

The defendant City of Lansing challenged the jury award, contending that the

## Family Wins, con't.

evidence against it was insufficient as a matter of law according to the U.S. Supreme Court's holding in *Monell v. Dept of Social Services*, 436 U.S. 658, 98 S.Ct. 2018 (1978). *Monell* holds that a local government may not be sued solely because of an injury inflicted by an employee, but may be sued when the employee's acts represent the execution of a government policy or custom and is the moving force for the constitutional violation.

The court found that there was sufficient evidence to support the jury's findings that the City of Lansing, by its failure to train officers and deliberate indifference, had caused both extreme force and a failure to provide needed emergency medical and psychological care to Edward Swans. "It is certain that an arrestee has a clearly established right against the use of excessive force," the court iterated. See: *Graham v. Connor*, 490 U.S. 386, 109 S.Ct. 1865 (1989); *Martin v. Heideman*, 106 F.3d 1308 (6th Cir. 1997).

At the beginning of the trial the judge had warned the defendants that due to the conflicts of interests they would be best served if each individual was represented by separate counsel. The court's concern went unheeded. The judge, in a scathing response to what he saw as indifference on the part of defense counsel, stated that "it became obvious that Defendants' single lawyer had not

assessed the value of the case, despite having lost a similar case .... As a consequence, an opportunity to settle the case was lost to the disadvantage of all of his clients."

The City of Lansing had offered to settle the Swans' case for \$250,000. Swans, it just so happens, died in the same cell where another arrestee, Richard Vine, had died a few years earlier. In 1995, a jury found the city liable for \$1.5 million in that case. The judgment in Swans' case of \$12.9 million was the largest ever in the federal Western District of Michigan.

The judge's conclusion says it all best:

"In the forty years since I graduated from law school, I have participated in many trials as a lawyer and as a judge. Never have I seen evidence more dramatic than in the instant case. Instead of the usual contradictory testimony about liability facts, this jury watched (many times) video evidence of the awful events that occurred in the last minutes of Edward Swans' life. In fact, this jury apparently watched Swans die.

"As if this were inadequate, the jury also witnessed defendants' indifference as they first left Swans alone in his cell unattended, and then when they realized belatedly, that he was dying or dead, they removed him from the cell of his death to another cell where they removed the 'hog-tie' restraints, and replaced them with less restrictive restraints. This was all done on camera ... and before attempting resuscitation.

"Although counsel for the defendants was unmoved by this drama, every nonparty in the courtroom, including sworn police officers now on security duty, was horrified. The jury's verdict reflects that horror.

"This was almost a case of 'justice denied' because, but for the video, there would have been no contradictory evidence to the testimony of defendants. Defendant City even tried to suppress or alter the coroner's report. This should cause court observers to wonder how many similar cases went unproved without the awful but truthful eye of the camera. In this case the camera cast a long shadow of shame on the defendants and their counsel."

Plaintiff attorney, Geoffrey Fieger, said the family has mixed emotions about the verdict. The money was not the main reward of the verdict, he said. "They're satisfied only in the sense that it was finally an opportunity to get a modicum of justice. Now there needs to be a criminal prosecution."

So far the City of Lansing, Ingham County's prosecutor, the FBI, and the Justice Department have all declined to press charges against any of the guards. And city officials vowed they would appeal what they said were several errors in the trial provoked by Fieger. No remorse, no shame, no mercy-typical behavior for the defenders of the American injustice system. See: *Swans v. City of Lansing*, 65 F.Supp.2d 625 (W.D. Mich. 1998).

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## From the Editor

By Paul Wright

Recent issues of *PLN* have reported on criminal justice news in Texas and the response from Republican presidential candidate, George Bush Jr., to these events. *PLN* has reported on Bush's supervision of the Texas plantation-like prison system and death machine to duly point out the fact that, in the real world, a compassionate conservative is the same as a friendly fascist.

By no means should *PLN*'s coverage be construed as a backhanded endorsement for Al Gore. *PLN*'s nonprofit status does not allow us to endorse candidates for political office anyway. While commentators have long compared the United States's two party system as two empty bottles with different labels, this is proven even more so with regards to criminal justice issues. For prisoners at least, the difference between the Republican and Democratic parties is the difference between being beat to death with a 2' x 4' and being beat to death with a baseball bat.

While everyone remembers the infamous "Willie Horton" television ads used by George Bush Sr. in the 1988 presidential campaign, Al Gore actually first raised the Willie Horton matter in his own presidential primary campaign against Michael Dukakis. Al Gore's positions on criminal justice issues are indistinguishable from Bush's. As a practical matter, the Clinton-Gore administration is the worst thing that has happened to American prisoners in living memory. The Anti-Terrorism and Effective Death Penalty Act, the Prison Litigation Reform Act and the 1994 crime bill, all covered in *PLN* at the time, are monuments to the repression and social cleansing advocated across the mainstream political spectrum. In 1992 *PLN* ran side by side comparisons of Bill Clinton and George Bush Sr., to illustrate their interchangeability. At this point, Gore and Bush Jr. have well-known public records on criminal justice issues that promise more of the same: more police, more prisons, longer sentences, more executions, and a wider, thinner net of police power.

Positive change will come about when the current criminal justice policies begin to meet active resistance from both the prisoners and the communities most impacted by them. Until then, the best we can expect is, to paraphrase Frank "Big Black" Smith, "to be driven like beasts."

This issue of *PLN* contains a review of a Bureau of Prisons "after action report" concerning the wave of uprisings that swept federal prisons in 1995 after congress refused to equalize the dramatic disparities between crack and powder cocaine sentences. *PLN* obtained the report through the Freedom of Information Act (FOIA). At the time of the uprisings the BOP claimed it had no idea why prisoners were rebelling. That is shown to be patently untrue. To date, *PLN* is the only media outlet to report on the BOP's assessment and how widespread the uprisings were.

*PLN*'s matching grant fundraiser continues. So far we have raised and received matching grant funds of \$8,642. In order to receive the full matching grant of \$15,000 *PLN* must receive a similar amount in donations from *PLN* supporters by January 15, 2001. If you have not donated yet, please do so. I would like to thank everyone who has donated so far.

A federal judge in Nevada recently granted a Preliminary Injunction motion ordering Nevada prison officials to deliver *PLN* to Nevada prisoners until the underlying lawsuit is resolved. As noted in this issue, the Wisconsin DOC has capitulated in its censorship of *PLN*. In the meantime, *PLN* faces sporadic censorship in other parts of the country.

*PLN* urgently requires financial support in order to hire a much needed second staff person. While *PLN* aggressively challenges censorship around the country, laying the groundwork for successful litigation is time consuming work that takes up scarce staff time which *PLN* can ill afford to spare. If you can afford to donate money to *PLN* please do so.

Readers can also help *PLN* by encouraging others to subscribe and helping us expand our advertising base. If you know of any businesses who do business with prisoners on a regular basis and who want to reach a national audience of prisoners, lawyers and citizens concerned about criminal justice issues, have them contact *PLN* for advertising information or send *PLN* their contact information and we will send them an advertising packet. Building up *PLN*'s advertiser base is another means of helping ensure *PLN*'s long term survival. ■

## WIDOC Ends Censorship of *PLN*

In early August 2000, the Wisconsin Department of Corrections (DOC) announced it would end its haphazard ban on *PLN* in Wisconsin prisons. Since January 2000, some Wisconsin prisons had refused to allow prisoners to subscribe or renew their subscriptions to *PLN* by paying for the subscription via their prison trust fund account.

The supposed reason for the ban was the Wisconsin's DOC claim that *PLN* constitutes "legal services", and because *PLN* is edited by prisoner Paul Wright it therefore constituted "paid legal services." Wisconsin prison rules prohibit prisoners from paying other prisoners for legal services. Hence the ban.

Several Wisconsin prisoners used the grievance system to no avail. *PLN* also wrote to DOC secretary Jon Litscher and his office responded stating *PLN* would be banned on this basis in all Wisconsin prisons.

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**We ask that readers keep *PLN* informed anytime *PLN* is censored, and that they exhaust whatever administrative remedies they have available and send *PLN* the documentation if that is unsuccessful.**

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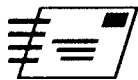
*PLN* retained Milwaukee attorney Larry Albrecht and ACLU National Prison Project attorney David Fathi to litigate the censorship. Mr. Fathi sent the Wisconsin DOC a demand letter stating that the *PLN* ban violated *PLN*'s First Amendment rights and was otherwise unconstitutional. The demand letter stated that if the ban was not lifted immediately, litigation would ensue.

The Wisconsin DOC responded by lifting the ban and claiming it had based the ban on "erroneous information." *PLN* has since sent letters to all of its Wisconsin prisoner subscribers and former subscribers, informing them of the change. We would like to thank Messrs. Albrecht and Fathi for their assistance in resolving this matter. We would also like to thank those Wisconsin prisoners who informed *PLN* of the censorship and exhausted their administrative remedies, which created useful evidence had litigation been necessary.

## WI Censorship, con't.

In recent years *PLN* has faced increased censorship in prisons and jails around the country. In most instances, such as this one, *PLN* is never notified of the censorship by prison officials. It is usually the prisoner subscribers who alert us to the censorship. In most cases *PLN* has been able to resolve the matter by writing or calling prison officials. When that fails we must find counsel willing to represent *PLN* on a contingency or *pro bono* basis who is also willing to advance litigation costs.

In some cases, such as this one, censors capitulate without a court battle. In others litigation is duly initiated. We ask that readers keep *PLN* informed anytime *PLN* is censored, and that they exhaust whatever administrative remedies they have available and send *PLN* the documentation if that is unsuccessful. At that point, *PLN* will contact prison or jail officials to attempt to resolve the problem. ■



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## News in Brief

**Belgium:** On July 10, 2000, Bertrand Sassoie, a political prisoner of the Combatant Communist Cells (CCC), was released after serving 14 years in prison. Sassoie had been convicted of participating in dozens of bombings carried out by the CCC against NATO and capitalist targets in Belgium. CCC members Pascale Vandegaarde and Didier Chevolet were released from Belgian prisons last February. Pierre Carette, considered by police to be the leader of the CCC, is the sole CCC member who is still imprisoned.

**Brazil:** On August 7, 2000, Jair Coelho, 68, was jailed on fraud and racketeering charges stemming from his lucrative contract to supply all prison food in Rio de Janeiro state, about 22,000 boxed meals a day. The quality of food supplied by Coelho has been criticized by prisoners and prison officials alike. Coelho has grown extremely wealthy from his prison food monopoly. While in prison awaiting trial he will be eating his company's food. Prison officials placed Coelho in protective custody. "This precaution was taken because there was a risk of retaliation from prisoners who eat the food supplied by his company," said Alvaro Lins, director of the Rio de Janeiro prison where Coelho is confined.

**CA:** On March 22, 2000, Francisco Gavaldon, 38, was sentenced to 10 years in state prison after being convicted of soliciting to commit murder and conspiracy to file a false police report. At the time of his arrest Gavaldon was employed as a guard at the state prison in Corcoran. Gavaldon had offered his brother-in-law, Dillon Fletcher, 41., \$1,000 to kill his ex-wife, Donna Gavaldon. Fletcher cooperated with police to foil the plot. Gavaldon had also asked his then 14 year-old son to hit his 10 year old sister in the mouth and then blame it on their mother.

**CA:** On April 24, 2000, race riots, which had ensued for three days at the Pitchess Detention Center of the Los Angeles county jail, left at least one prisoner seriously injured and 80 others injured. Latino prisoners, who outnumber blacks 2-1 in the jail, are fighting with black prisoners. As a result, the sheriff's department has begun to racially segregate the jail. Sheriff Lee Baca claims the riots are being instigated by the Mexican Mafia. The Pitchess jail, which houses prisoners in 60-120 bed dormitories, has had more than 150 major disturbances since 1991. To date, no one has been killed.

**CA:** On June 8, 2000, U.S. Marshal Peter Hillman, 47, and prisoners Cuahtemoch Ruiz, Rommel Escaonter and Cesar Ramirez died when the van they were traveling in went off the road in Bakersfield. The victims were burned alive when the van burst into flames. The prisoners were shackled throughout the ordeal. The crash occurred when two tractor trailers side swiped each other and caused a chain reaction crash. One other motorist was killed and five others, including U.S. Marshal Mike Delpupo, were injured in the crash.

**CO:** In early July, 2000, James Rigby, a prison guard at the privately owned Crowley County Corrections Facility, was arrested by local police and charged with impersonating a peace officer. Rigby had showed up at a wedding, in a uniform with a badge and pistol, and ordered the guests to turn down the music. Wedding guests who knew Rigby ordered him off the property and reported his actions to police.

**FL:** On July 13, 2000, state attorney Harry Lee Coe III, Tampa's prosecutor, shot himself to death alongside a freeway. Coe was being investigated for borrowing \$12,000 from two employees he supervised.

**Guatemala:** On June 29, 2000, Amilcar Cetino Perez and Tomas Cerrate Hernandez were executed by lethal injection for killing Isabel de Botran, a wealthy heiress, during a kidnapping. The men's execution was broadcast live on Guatemalan television.

**IN:** On July 30, 2000, Roy Miller, 21, a Floyd county prisoner being treated for drug withdrawal and delusions at a local hospital, wrestled with jail guard James Dexter, 29, while being returned to the jail. Miller grabbed Dexter's pistol, shot him twice, ran away and then shot himself to death in an alley. Dexter survived the shooting.

**Mexico:** On July 9, 2000, guards at the Chetumal prison in southern Mexico discovered six workers building a six hundred thirty-three foot tunnel into the prison so Colombian drug traffickers could escape.

**MI:** The Kent county jail in Grand Rapids has a program where jail prisoners can call a toll free number to anonymously report crime tips in exchange for cash rewards.

**NJ:** On August 2, 2000, state police trooper Timothy Smith, 35, pleaded guilty in Llamuchy Township municipal court to a misdemeanor charge of simple assault stemming from an attack on Justin

## News in Brief, con't.

Mills, a detainee arrested on drug charges on December 27, 1999. The attack occurred in the state police building.

**NY:** The NY Department of Correctional Systems is building 31 observation towers in its 27 medium security prisons. The towers will be used primarily for surveillance purposes. Twenty-seven of the towers will be built by the prison system's prison slave-labor outfit, Corcraft, the remainder will be built by contractors. The projected cost of the towers is \$12.5 million.

**NY:** On May 10, 2000, Michael Carroll, 41, a guard at the Coxsackie Correctional Facility was fired from his job after being administratively charged with lying to FBI and NY Inspector General's Office investigators. Carroll is accused of failing to stop prisoner Sam Hall from assaulting prisoner Justin Eldred. Carroll also struck Eldred on the head, back, legs and groin with a baton while Eldred was handcuffed and on the ground. For good measure, Carroll planted a 7-inch shank in Eldred's cell, causing Eldred to lose his parole release date. The FBI has also investigated the charges against Carroll but has not yet

charged him with any crimes. Carroll is administratively appealing his firing.

**NY:** On July 27, 2000, Millard Lonkey Jr., 47, a guard at the Cape Vincent Correctional Facility, was arrested by the NY State Internet Crimes Against Children Task Force on charges of attempted kidnapping and attempting to disseminate indecent materials to a minor. Lonkey was caught in a police sting operation. He thought he was going to meet a 13 year old girl from Colorado, whom he wanted to have sex with, then raise as his daughter. The "girl" in question turned out to be an undercover policeman.

**OH:** On April 20, 2000, Youngstown municipal court judge Andrew Polovischak Jr., 48, pleaded guilty to federal racketeering charges for conspiring with three criminal defense attorneys to fix cases over which he presided as a judge. The defense lawyers have all pleaded guilty and are cooperating with the FBI.

**OH:** On June 12, 2000, a state grand jury charged Tamara Welton, 30, with five counts of sexual battery for having sex with Rommell Knox, a convicted murderer. Welton was the Warren Correctional Institution's clothing supply room supervisor and Knox was her assistant. Prosecutors claim the two had sex

on a regular basis in the prison clothing room. Welton quit her prison job in the midst of the criminal investigation.

**OR:** On June 25, 2000, a yard brawl at the Oregon State Penitentiary in Salem left two prisoners with nonfatal stab wounds and the prison on lockdown. The melee, which involved 100 prisoners, ended after guards fired 17 warning shots. No reason was given for the incident.

**TX:** On August 8, 2000, Terry Rhodes, 31, escaped from the Wynne unit prison in Huntsville by crashing a tractor trailer rig through a prison fence and then fleeing in a car driven by his wife. Guards fired numerous shots at Rhodes who escaped unharmed. Rhodes worked as a mechanic at the prison and had access to trucks. Rhodes was serving a 45 year sentence for aggravated sexual assault. Rhodes was recaptured a week later.

**UT:** On July 18, 2000, Utah state prisoner Jason Kirk filed a federal lawsuit claiming he was shot in the groin with a rubber ball by prison guard Robert Grace. Kirk was shot for allegedly refusing to return to his cell on November 11, 1999. As a result of the shooting, doctors had to remove Kirk's left testicle and surgically repair his genitals. ■

## Arpaio Runs for Reelection on Backs of Prisoners, For the Third Time

*By Paul Wright*

With the American electoral process consisting largely of saccharine spectacle, and with no substantive issues to get in the way of corporate rule, prisoner bashing has become an accepted political path to elected office. Politicians vie with each other to show who is most insensitive to human rights issues.

Mark Twain once commented that no man's life, limb, liberty or property was safe when the legislature was in session. For prisoners the same can be said whenever politicians run for office.

Joe Arpaio is the Phoenix, Arizona sheriff dubbed "America's Toughest Sheriff" by tabloids. Arpaio is a publicity hound who has garnered media attention by banning coffee and sexually explicit magazines at the jail, feeding prisoners rotten food, housing them in tents, dressing them in pink underwear and striped uniforms, instituting chain gangs, etc.

Little reported by the corporate media are Arpaio's more brutal practices which include the regular beatings and assaults of prisoners and medical neglect. *PLN* is the only publication that regularly reports the settlements and jury verdicts rendered against

Arpaio for the unconstitutional conditions that run rampant in his jail. This includes the \$8.5 million settlement paid to the family of Scott Norberg, a prisoner who was beaten to death by jail guards at the Phoenix jail.

As he runs for reelection for his third term as Maricopa county sheriff, Arpaio has announced new publicity stunts to propel his candidacy.

In mid July 2000, Arpaio announced he would install internet web cameras to film and broadcast on the internet everyone booked into the Madison Street jail in Phoenix. Presumably the beatings and murders by jail guards won't be broadcast.

In early June 2000, Arpaio announced that prisoners in segregation who assault jail guards will be fed only bread twice a day and be forced to drink water from cell spigots. The "bread" in question is a five ounce loaf baked with potatoes, raisins, carrots, tomato juice, beans and chill powder. Prisoner rights advocate James Hamm commented, "This guy is the world's classic schoolyard bully. He's playing games by using the bread and water diet. Because that's his whole thing."

The Maricopa county sheriff's department is also responsible for housing abused animals. In June Arpaio announced that abused dogs will be housed in air conditioned cells in the First Street jail. No prisoners are housed in air conditioned facilities. Prior to this, the dogs were housed in tents with prisoners. Arpaio said, "It's too hot for the dogs over in the tents with the inmates, so I'm putting them in here." Prisoners will continue to languish without air conditioning in the Arizona heat.

Arpaio said he spends 66¢ a day to feed human prisoners at the jail but he will spend \$1.15 per day to feed the dogs. The expense difference is not because dog food is more expensive than human food. As Arpaio said, "I just want to feed them better."

Arpaio seems to be a shoo in for reelection. So far it doesn't appear that American politicians can go wrong by bashing prisoners. Whether running for county sheriff or president, prisoner bashing paves the way to elected office. ■

Sources: *Arizona Republic*, *Dallas Morning News*

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# PRISON

## Legal News

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### Whistle-blowing Doctor Shakes Up Nebraska DOC

*By Dan Pens*

*I have a story to tell—about how a doctor can be used to kill patients. I will talk to anybody you want me to. I spent twelve years of my life, and these people push me around and turn me into something horrible. I am ashamed of what I have become, I really am... For the first time, I stood up and said, "I can't kill any more. Too much. These are human beings, for crying out loud."*

— Dr. Faisal Ahmed interview with Nebraska Ombudsman's Office, September 15, 1998.

### Inside

Corcoran Trial	4
NJ Mental Health Care	6
FL 'Predator' Escape	7
Restorative Justice ?	10
Post-Conviction Update	12
Book Review	16
Slave Labor In Texas	17
News In Brief	20
Kosher Diet Suit	22
From The Editor	23
WA Radiation Suit	24
Withholding Interest	30
9th Cir. Porn Ruling	32

On September 10, 1998, Nebraska state prisoner Robert Zolper died of a heart attack—and needlessly so. According to Nebraska Department of Correctional Services (DOCS) doctor Faisal Ahmed, Zolper died because prison medical workers failed to perform cardiac life support. Equipment and supplies that could have been used to save Zolper's life were not even taken out of locked cabinets. By the time Dr. Ahmed was summoned to the scene, 20 minutes had elapsed and Zolper was by then essentially beyond saving.

Ahmed was suspended for his actions during Zolper's medical emergency. Supervisors criticized him for "speaking forcefully to medical staff" at the time of Zolper's heart attack. Eventually he was given disciplinary probation for "failing to maintain a positive working relationship" with other medical staff.

Zolper's death was the final straw, as far as Dr. Ahmed was concerned. Five days after the incident he went to the state Ombudsman's Office, an arm of the Legislature charged with investigating complaints against state agencies. The visit was described later in a report issued by the Ombudsman's Office.

"Dr. Ahmed's original visit with the Ombudsman's office led to an extensive series of interviews that covered a wide range of issues pertaining to the operation of the medical services system of the Department of Correctional Services," the report says. "Dr. Ahmed outlined and described numerous areas and cases in the functioning of that medical system, many of which were suggestive of a system that was indifferent, if not calloused, to the health, safety and lives of the patients whom the system was designed to serve... The

Ombudsman's Office quickly recognized the importance of the information Dr. Ahmed was providing in terms of the insights it offered into the workings of the Department's medical system."

Among the allegations raised by Dr. Ahmed were: inadequate diagnostic procedures for prisoners suffering chest pains; inadequate treatment of gastrointestinal bleeding; inadequate treatment of hepatitis C; failure to surgically repair hernias; inadequate use of anesthesia and pain medications; and inadequate equipment and supplies. Prompted by these allegations, the Ombudsman's Office launched a year-long investigation.

Dr. Ahmed is one of only two physicians employed by the state prison system. He is a resident alien from Pakistan who received his medical training in the U.S. and is authorized to remain in the country under a program that allows foreign doctors to continue to reside in the U.S. if they are working in an area (for example, prisons) where there is a special need for doctors.

Dr. Ahmed's supervisor is Dr. John Cherry, the Medical Director of the Nebraska prison system. The Ombudsman's Office made several attempts to interview Dr. Cherry, noting that he "would obviously be an important source of information relative to virtually all of the issues raised by Dr. Ahmed."

The initial interview was attempted June 17, 1999, but was quickly aborted when Dr. Cherry objected to some of the questions asked and stated that the interview was "more than [he] can handle emotionally." Further attempts at interviews were thwarted by Cherry and DOCS legal counsel.

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## Whistle-blowing (cont.)

The Ombudsmen's Office "encountered a great deal of misdirection and difficulty in its repeated efforts to secure documentation... pertaining to Dr. Cherry's professional history," according to a report later issued by the Ombudsman's office. But the ombudsman was able to obtain a transcript of testimony Dr. Cherry offered under oath during an administrative hearing pertaining to allegations of retaliation against Dr. Ahmed. Excerpts from that testimony shed light on why Dr. Cherry may have been upset by questions pertaining to his background:

Q: You worked at Lincoln General [Hospital]. What did you do there?

A: Private practice general surgery.

Q: So you had your own private practice, but were - had hospital privileges at Lincoln General?

A: Yes.

Q: And at some point you stopped having privileges at Lincoln General, is that right?

A: Yes

Q: And why is it that you lost your privileges at Lincoln General?

A: There was concern over four patients of mine that died.

Q: All right. And the next job that you had after your private practice was at the Department of Corrections, right?

A: Correct.

Q: And when you lost your privileges at Lincoln General, did you cease your private practice?

A: Yes.

There were other instances of attempts by the DOC to interfere with the ombudsman's investigation. In response to a request for copies of nurses' telephone logs for the years 1994 through 1999, the Ombudsman's Office was advised that all the logs for 1994 through 1998 had been destroyed. When asked why those records had been destroyed (a "probable violation" of the State Records Management Act, according to the Ombudsman's Office), the DOC asserted that the logs in question were not official state records but the "personal property" of the nurses.

In November 1999 the Ombudsman's Office released its 114 page report (with several hundred pages of additional exhibits and attachments) describing a prison health care

system so inadequate that "in many instances it fails to meet the agency's fundamental obligation to provide for the medical needs of its inmate population."

"I think it can be said that this report is extremely critical of the Department of Correction's medical services to inmates," State Ombudsman Marshall Lux told the *Lincoln Journal Star* after the report's release. "The problems that are there are systemic, and they've been growing in recent years."

The report gave multiple examples of what it depicted as departmental bungling or indifference to ill prisoners (many of whose names are concealed in the report). Among the examples given is the following:

*Mr. G: While sitting in a chair inside the state penitentiary hospital about 8 P.M. May 9, 1999, Mr. G slumped and began breathing heavily. A short time later, at age 40, he was pronounced dead at a Lincoln hospital.*

According to the report, a nurse at the prison could have used a simplified defibrillator on Mr. G but had not been trained to use the machine, which had been in the prison infirmary for months, if not years. "This is analogous to having a lifeguard at the beach who has not yet been trained to swim," the report said.

*Mr. L: Just before his 1998 incarceration at the state penitentiary, Mr. L was hit by a car and sustained serious injuries and required pins in his pelvis and a hand. Mr. L was in continual pain and asked the medical director, Dr. Cherry, to remove the pins.*

In early April, a local orthopedist examined Mr. L and said the pelvic pins should be removed in three weeks. Mr. L told investigators he saw Dr. Cherry and a maintenance worker in a hallway examining an old hammer drill. Cherry approached Mr. L and told him he was going to use the drill to remove the pins. He also told the prisoner he would not be given anything for the pain because the procedure "would not take too long."

The prisoner refused to allow Cherry to remove the pins, the report indicated. Ombudsman Lux noted that the prisoner's story was corroborated by an April 29, 1998 physician's order signed by Cherry that stated: "Please obtain drill and wrench from maintenance."

"In summary," the report said, "we have found the agency's medical department to be understaffed, inadequately trained, poorly organized and badly led."

In every aspect, the prison health delivery system was found wanting, Lux told the *Journal Star*. But the key to the myriad concerns raised in the report, he continued, was the DOC's strong interest in reducing the cost of medical services. "It's all about money," he said.

The DOCS Planning Research and Accreditation Manager, Steve King, said the department has a medical budget of \$8 million that has increased by 4.25 percent on average for each of the past six years. However, the ombudsman's report notes that spending per prisoner declined 8 percent in the two years beginning July 1, 1996, compared with the average of the five previous years.

Harold Clarke, director of the DOCS, disputed the ombudsman report's overall findings. "Who are their experts?" he said. "My experts are the medical professionals that work with inmates. It's easy to sit back and be a quarterback after the fact. My position is, when an offender is ill, he will receive appropriate treatment."

Clarke disputed any suggestion that the DOC placed greater emphasis on saving money than on the health care of prisoners. "Money has not been a problem for us. The Legislature, the governor have been very generous," he told the *Journal Star*. "If we need extra money, we can get it."

Two weeks after the Ombudsman's Office released its report, the governor appointed an independent task force to evaluate the prison health care system. The task force, composed of medical professionals from across Nebraska and headed by retired Nebraska Supreme Court Chief Justice William Hastings, spent about six months reviewing records before releasing its findings.

One former nurse, Arlene Trainor, told the task force that she quit after being ostracized for questioning medical practices at the state penitentiary.

"The nurses were hateful and vindictive to the inmates," said Trainor, who worked as a registered nurse for the prison system from 1981 to 1995. "A mean-spiritedness started to permeate the department."

Former prisoner Larry Christenson told the task force that he nearly died because prison medical staff told him little about his diabetes.

"I committed a crime, but I don't remember the judge giving me a death sentence," he said. He testified that he only began to learn about his diabetes, and how to control it, after

he joined an education class run by a former DOC registered nurse.

That nurse, Donna Amedeo, told the task force how prison medical staff often exhibited contempt for their patients.

"I was told, 'Donna, don't you know who you're dealing with? These are robbers, murderers and thieves,'" she told the task force. "I was not very popular with the staff because I would encourage inmates to get medical treatment."

Cynthia Danielson testified that her fiancé broke a finger playing football at the Lincoln Correctional Center and endured weeks of pain before getting treatment. For three weeks, she said, all they gave him was an ice pack. The finger later required three surgeries to repair.

Virgil Jacobs, whose two sons are serving life sentences for murder, testified that prison medical staff view prisoners as less than human, sometimes with deadly consequences.

"I don't know why the state of Nebraska needs a death penalty when inmates are dying from lack of proper medical care faster than the state can execute them," he said.

DOC director Harold Clarke told the task force that Nebraska is one of just eight states to have had its entire prison system, including its health care, accredited by the American Correctional Association (ACA).

But State Senator Dwite A. Pedersen, vice chairman of the Legislature's Judiciary Committee, urged the task force to look closer at the ACA accreditation, noting that ACA auditors themselves are prison officials. He characterized the ACA audit as a "good old boy system."

"I am upset by the arrogance displayed by the Department [of Corrections]," Pedersen told the task force. "I hope and pray... your efforts will lead to real changes."

The Governor's task force issued its 36-page report June 27, 2000. The report concluded that the prison health care system had become so riddled with problems over the years that only sweeping reforms could fix the problem.

"The downward spiral accelerates until finally it becomes impossible to repair the system any longer, and major reforms in structure and approach become imperative," the report states. "We feel that the system of health care at the Department of Correctional Services has reached such a point."

Among the findings of the task force:

- The current prison medical system is focused more on administration than delivery of health services.
- The DOCS often lacks community-based procedures when attending to ill prisoners. On occasion, the result has been "disastrous, including the loss of life."
- Out-of-date drugs were stocked in some prison pharmacies.
- The department's "excessive concern" with prisoners who abuse pain medications has often resulted in prisoners with serious pain being denied medication.
- Low morale and indifference to patients by prison medical staff is a "problem" brought about, in part, by low pay and poor working conditions.
- The prison medical system "suffers an imbalance" that gives greater weight to cost control and security than quality health care.
- The condition of medical services raises concerns about the department's liability under the law.

Among the task force's recommendations for reforming the prison health care delivery system:

- Policies and practices for distributing pain medication must be consistent and humane.
- An independent body of medical professionals should be created to oversee the prison health care system.
- Standards of competency, performance and compliance with conventional medical protocols must be improved.
- The state should increase pay for prison medical staff in order to attract and retain competent personnel.
- The department needs to recruit a medical director who is willing and able to initiate change and who believes that "health care is a right, not a privilege."

Dr. Ahmed, whose allegations of substandard prison medical care led to the creation of the Governor's task force, filed a federal lawsuit against state prison officials in March 2000. Ahmed's suit alleges that officials suspended and contemplated firing him because he went outside the department with criticism of prison medical services.

"It's really centered around the First Amendment," Ahmed's lawyer, Eric B. Brown, told the *Journal Star*. "He should not be punished for speaking out on matters of public concern."

The suit contends that Ahmed was described as an exemplary employee until his superiors became aware in September 1998 that he reported his concerns to the Ombudsman's Office.

Ahmed was suspended three times and placed on disciplinary probation between September 1998 and November 1999. The lawsuit cites a highly critical December 14, 1998, memo from Dr. Cherry: "Dr. Ahmed has successfully alienated the entire nursing staff of the medical division and the physician assistants. I spend most of my time explaining his actions to patients, nurses, physician assistants, administrators, security and assistant ombudsman."

The Ombudsman's Office completed two separate retaliation investigations involving Dr. Ahmed and concluded in both that he was retaliated against. A separate hearing conducted by the State Personnel Board also concluded that Dr. Ahmed was a "whistleblower under the Government Effectiveness Act" and that he had been retaliated against by Dr. Cherry and other prison officials in violation of the Act.

Ahmed's federal lawsuit seeks unspecified compensatory and punitive damages to be determined in a jury trial, plus attorney fees.

Sources: *Lincoln Journal Star*, *Omaha World Herald*, Report of the Nebraska Ombudsman's Office

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## Corcoran Show Trial Ends With Acquittals

by Dan Pens

The saga of Corcoran's infamous SHU shootings ended June 8, 2000 when a jury acquitted eight California prison guards of federal charges that they entertained themselves by staging gladiator-style fights among prisoners from rival gangs.

Between 1989 and 1994 seven unarmed prisoners were fatally shot by guards for fighting while confined in see tiny concrete exercise yards of Corcoran's Security Housing Unit (SHU). The killings were described to *PLN* by a Corcoran prisoner like "shooting fish in a barrel."

Federal charges against the eight Corcoran guards were brought when two of their colleagues blew the whistle to FBI officials after SHU prisoner Preston Tate was fatally shot on April 2, 1994.

The eight were indicted in February 1998 for conspiracy and for violating the civil rights of SHU prisoners by failing to keep them safe from harm. Combing through prison reports, the prosecutors alleged that 84 fights took place during the defendants' shift during one five and a half month period—300% more than in other Corcoran SHU units or on other shifts.

The prosecution focused on two of the fights. Corcoran Sgt. Truman Jennings and guards Timothy Dickerson, Michael Gibson and Raul Tavez were charged for staging a tag-team fight among three SHU prisoners on February 23, 1994.

Lt. Douglas Martin, Sgt. John Vaughn and guards Jerry Arvizu and Christopher Bethea were indicted for setting up the brawl that ended with Tate's death. It was a round from Bethea's 9mm rifle that struck Preston Tate in the head and killed him. Bethea said he was shooting to wound the other prisoner who was fighting with Tate.

SHU prisoner Anthony James, a key prosecution witness, testified that Bethea bragged moments before the fight broke out that it was "duck hunting season."

Preston Tate's death led to an \$825,000 settlement after his family filed a wrongful death suit in civil court. Media attention surrounding the Tate shooting prompted the California department of Corrections (CDC) to revise its policy on the use of deadly force. Besides the seven fatally shot, dozens of Corcoran SHU prisoners suffered non-fatal gunshot wounds between 1989 and 1994. Since the CDC revised its shooting policy not one Corcoran prisoner has been shot.

Defense lawyers successfully deployed the "Nuremberg defense," maintaining throughout the nine week trial that their clients did not set up any fights and were merely doing their jobs. They blamed the violence on an ill-conceived "integrated yard" policy, mandated by senior CDC officials, designed to force prisoners from rival gangs to exercise together.

Some observers believe the prosecution lost the case before the trial began when the seven man and five woman jury was impaneled. One male juror had applied to become a prison guard. The late husband of a female juror had been a Sergeant at a CDC prison. Another female juror worked for the Madera County jail system. And another is a Superior Court clerk.

Defense attorney Wayne Ordos told the *Sacramento Bee* that he was "ecstatic" with the makeup of the jury. Ordos, a former federal prosecutor, said that if he were prosecuting the case he would have eliminated several of the jurors with challenges. Assistant U.S. Attorney Jon Conklin, who headed up the four-member prosecution team, would not comment about the jury makeup.

The jury deliberated for less than six hours. As the verdicts were read by U.S. District Court Judge Anthony Ishii, some relatives of the guards broke into uncontrollable sobs. One defense attorney slammed his fist down on the table while another shouted, "All right!"

"They were able to figure out in five hours what the federal government couldn't figure out in six years," said, Christopher Bethea, the guard who fatally shot Preston Tate.

Juror Dorene Delt, an employee of the Madera County Jail, summed up the sentiments of her fellow jurors when she said the case lacked substance from the start.

"You've got to have some meat in the soup," Delt told the *San Francisco Chronicle*. "We could see from the beginning that there was no substance."

Another juror, Charlene Hefner, who is married to a retired California prison guard, said the government's case was "shallow."

Some of the defendants wept with relief and wiped tears from their eyes as the verdict was read. Later, they appeared giddy as they

embraced jurors in bear hugs. At least one juror had his photo taken with the defendants, and another collected the guards' autographs.

One of the defendants, Jerry Arvizu, said a "cloud was lifted" by the verdict. But he expressed uncertainty about returning to the prison and was worried about retaliation from the prisoners. He swore he would never work again inside a security housing unit.

Guard Michael Gibson said he was "relieved and happy" but ashamed that the government pressed such a flimsy case.

"To be honest, I don't think I could ever pull a trigger for the Department of Corrections again," he said when asked about his future. "Look at what happens for doing our jobs."

None of the guards still works at Corcoran. Six transferred to other CDC posts and two have retired. The whistleblowers, former Lt. Steve Riggs and guard Richard Caruso, both went on disability leave for stress-related problems. The pair found it impossible to work in any California prison because other guards ostracized them for breaking the CDC "code of silence."

Carl Feller, the U.S. Attorney in Fresno, said he would accept the verdict, and continue to prosecute guard brutality cases in the prison system. In November 1999, four Corcoran guards were acquitted of setting up the rape of a prisoner, placing him in the cell of the notoriously violent "booty bandit" in retaliation for the prisoner's attack on a female guard.

Prosecutors in both cases were faced with the daunting task of trying to convict prison guards in California's Central Valley. Jurors in the valley tend to be sympathetic to guards because prisons provide much of the region's non-farm employment, as many as 10,000 jobs.

The state's powerful prison guard union saturated the Fresno media market with TV and radio commercials before and during both trials, describing prisoners as "violent predators" and dubbing Corcoran as the "toughest beat in the state."

It is difficult not to compare the Corcoran trials to sham trials held in the deep South during an era of Jim Crow justice when it was nearly impossible to convict a white man of killing a black. It's all in the makeup of the jury. It's in a culture of oppression that institutionalizes the precept that members of the oppressed group are sub-humans who need to be kept in their place. It's the acceptance of the notion that, unfortunately, homicidal

violence is often necessary to keep the sub-humans in line.

The seven bullet-riddled dead and countless wounded Corcoran prisoners are, after all, "violent predators" who threatened those brave souls who walk the "toughest beat in the state." ■

Sources: *Sacramento Bee*, *San Francisco Chronicle*, *The Associated Press*.

## Pelican Bay's Bloody Wednesday

by W. Wisely

On Wednesday, February 23, 2000, one of the bloodiest riots in California prison history broke out among some 200 Black and Latino prisoners. The violence erupted at the state's infamous Pelican Bay prison. Guards sprayed rioting prisoners on the B Facility yard with more than 24 rounds from assault rifles, wounding 15 and killing one, according to a report by *California Prison Focus*.

The fighting began around 9:30 a.m. on that rainy, overcast day. "We don't know how this riot began or what precipitated the incident," Margot Bach, a Department of Corrections spokesperson, told the *San Francisco Chronicle*. Guards lobbed tear gas, squirted pepper gas, fired rubber and wooden bullets, and then let loose with .223-caliber rounds from their Ruger Mini-14 assault rifles.

It took 120 guards thirty minutes to quell the violence. "They did a great job," Cal Terhune, Department Director, told the *Chronicle*. Steve Fama, an attorney with the San Rafael Prison Law Office, said overcrowded conditions at the prison "probably had a lot to do with [the] riot." But, interviews with 50 prisoners by California Prison Focus indicates the violence may have been instigated by guards.

One prisoner confided that a guard told him, "Do whatever you're going to do today, because tomorrow the prison is going on lockdown." Before yard release February 23rd, another guard told a prisoner, "It's your lucky day." Since the August 31st incident, Black and White prisoners have been let out, a few at a time, to the yard. On each occasion, fighting broke out between the groups.

Some 89 prison-made weapons were recovered after the riot ended. Yet, guards searched all prisoners before releasing them to the yard that morning. Prisoners told *California Prison Focus* that the searches were

much less thorough than usual. Lt. Ben Grundy told the *Chronicle* that the animosity between the groups was so heated that "even at the end, part of the [prisoners] still wanted to fight each other. Even after they were in cuffs."

Sixteen ambulances arrived at the prison to rush the wounded to local area hospitals. Sixteen prisoners were shot, and at least another 19 had stab wounds. Sutter Coast Hospital CEO John Menaugh said, "I've been here 14 years, and we've seen nothing close to it. The staff's pretty drained right now." The prisoners caused no problems for hospital staff. "They were very calm, and very thankful for their care," Menaugh told the *Chronicle*.

The shooting death was the first since the California Department of Corrections issued a new shooting policy April 1, 1999. A Department spokesman said the last fatal shooting in a California prison was May 7, 1998, at Pleasant Valley Prison in Colton. ■

Sources: *California Prison Focus* San Francisco *Chronicle*

ITS/Cheryl Dogget

# \$16 Million Agreement to Revamp NJ Prison Mental Health Care

by Matthew T. Clarke

A federal district court in New Jersey has approved a \$16 million settlement in a class-action suit against state prison officials for constitutionally deficient prison mental health care.

Patricia P. Pearlmutter, assistant professor of clinical law at the Center for Social Justice at Seton Hall University School of Law in Newark, New Jersey, and Sandra L. Cobden, a senior associate at the New York law firm of Debevoise & Plimpton, teamed up in a three-year battle to bring the treatment of mentally ill prisoners in the New Jersey Department of Corrections (DOC) into the twentieth century, just in time for the twenty-first.

The fight began with Professor Pearlmutter's investigation into allegations of assaults on mentally ill prisoners by guards when she was at the now-defunct state Office of Inmate Advocacy. In 1996, the investigation widened into preparation by a law school clinical litigation class for filing a lawsuit pursuant to 42 U.S.C. § 1983, for civil rights violations, and 42 U.S.C. § 12132, for violations of the Americans with Disabilities Act (ADA). William Fauver, DOC Commissioner at that time, had a reputation for fighting every case filed by prisoners. Therefore, Professor Pearlmutter's class quickly realized they would need some help to be successful in the anticipated legal battle against the DOC and private mental health services contractors Correctional Medical Services, Inc. (CMS) and Correctional Behavioral Services, Inc. (CBS).

"When the Center for Social Justice decided they were going to do this, they decided they were going to need a large firm with significant resources. They asked us, and we were glad to help," said Ms. Cobden, whose 400-lawyer firm, with offices in New York, Washington, D.C., London, Paris, Hong Kong and Moscow eventually committed ten lawyers to the suit which, even though it never went to trial, involved over forty court appearances, thirty depositions, and testimony by psychiatric experts.

"The state was very good at delaying," said Professor Pearlmutter. "We could never have pursued this case by ourselves."

On November 7, 1997, Fauver resigned and was replaced by Jack Terhune, a former county sheriff, who moved to settle the case. During the discovery phase of the case, 12,000 pages of documents were produced. Intense negotiations began in November of 1998 and

continued until March of 1999, resulting in a settlement.

Under the terms of the settlement, the DOC will (1) amend its disciplinary regulations, (2) adhere to a mental health treatment plan, (3) make a statement on new policies and procedures, (4) fund the monitoring and enforcement of the settlement, and (5) along with CMS and CBS, be excused from liability.

## Disciplinary Regulations Changes

Under the new disciplinary regulations, prisoners with pending disciplinary charges will have their names given to the mental health staff before the disciplinary hearing. The mental health officer will then inform the hearing officer whether the prisoner is undergoing mental health treatment. The hearing officer must then consider all the information available to him and may (1) request a psychological or psychiatric evaluation of the prisoner, (2) impose punishment on the prisoner, and/or (3) refer the prisoner to a mental unit for appropriate care and treatment.

A prisoner held in disciplinary segregation who suffers deterioration in his mental health condition must be referred to administrator of the prison. A Special Administrative Segregation Review Committee must release a prisoner from segregation if there is a history of mental illness and it decides that continued confinement in segregation would be harmful to the prisoner's mental health.

## Mental Health Treatment Plan

All new prisoners will receive a mental health assessment within 72 hours of arrival. The DOC is required to ensure adequate staff and give guards, internal affairs investigators, disciplinary hearing officers and administrators additional training about mental illness and dealing with mentally ill prisoners.

The DOC will create three Stabilization Units (SU's) for the treatment of mentally ill prisoners during a mental health crisis. It will also create Residential Treatment Units and Traditional Care Units (TCU's) to provide a structured and supportive environment for prisoners discharged from a SU but unable to return to general population. TCU's will assist in the gradual transition to general population with mental health staff determining appropriate placement of prisoners.

The DOC agreed to amend existing regulations, policies, and procedures or create new ones as necessary to comply with the plan. This includes disciplinary regulations, involuntary medication policies and procedures, use of force policies, medication policies and

procedures, and discharge planning. A court-appointed monitor, Dr. Raymond F. Patterson, will review policy and procedure changes and ensure compliance with the plan. He is required to inspect DOC facilities four times a year.

New Jersey is required to fund implementation, monitoring, and enforcement of the plan through Fiscal Year 2000. To this end, the legislature approved \$16,000,000 to implement the settlement. The settlement will remain in effect until the DOC is in compliance with the plan for twelve consecutive months.

In assessing the fairness of the settlement, the court noted that, under the settlement, in the SU's there must be one psychiatrist for every 35 prisoners, one psychologist for every 50 prisoners, and one licensed social worker for every 25 prisoners. SU's will also be staffed by psychiatric nurses. Prior to the settlement, there were a total of 5 psychiatrists in the entire DOC serving approximately 400 mentally ill prisoners. This vast improvement in the treatment of mentally ill prisoners represents most of what the plaintiffs could have hoped to accomplish in a trial and is in the range of the best possible recovery for the plaintiffs. Therefore, the court held that the settlement was fair.

Noting that the attorneys' fees for the plaintiff would amount to \$3,900,000 if billed at the normal rate for plaintiffs' counsel, the court approved the plaintiffs' request for \$1,200,000 in attorneys' fees. Plaintiffs' class counsel requested the reduced amount because they had taken the case pro bono with the primary objective being to effect an improvement in the treatment of mentally ill prisoners in New Jersey. The attorneys' fee request was made after the settlement had been agreed upon. It is significantly lower than the amount calculated by either the lodestar method or the PLRA attorney fees cap even if hours worked on ADA issues and hours worked prior to the enactment of the PLRA, normally not subject to the cap, were included in the cap. Therefore, the court found the attorney fees request to be reasonable.

See: *D.M. v. Terhune*, 67 F. Supp.2d 401 (DNJ 1999). Additional Source: *The National Law Journal* ■

Editors Note: Settlement was entered, the NJ DOC has yet to comply. *PLN* will report this case further in upcoming issues.

# Florida 'Sexual Predator' Fails in Daring Bid for Freedom

A "violent sexual predator" who broke out of Florida's civil commitment detention center in a brazen midday helicopter escape was captured, along with his helicopter-flying accomplice, 4½ miles away after a 25-hour manhunt.

Shortly after 1:00 P.M. on June 5, 2000, Steven Whitsett jumped into a hovering chopper piloted by his longtime friend, Clifford Burkhart, a student pilot with 31-hours flying time on only his second solo flight. The tiny two-seat chopper bounced once and then barely cleared a 15-foot double razor wire fence before flipping out of control and crashing in an orange grove about 100 yards beyond the fence. Whitsett, 28, and Burkhart, 23, fled on foot. Investigators found two empty holsters in the crumpled helicopter and immediately launched a massive manhunt.

In 1994 Whitsett was a psychology student at Nova University. While conducting academic research at a juvenile sex offender treatment center, he apparently befriended several of the juvenile detainees, performed sex acts and took nude photos of a 15-year-old boy. He pleaded guilty to three counts of sexual battery on a child by a person in custodial authority, and two counts of lewd, lascivious or indecent assault on a child.

After serving 4½ years of an eight year prison sentence, Whitsett was released in September 1999 and immediately transferred to the Martin Treatment Center (MTC) under Florida's civil commitment statute (known as the Jimmy Ryce Act).

The center has a capacity of 125 and currently holds 105 former prisoners. A larger, 600-bed facility is under construction on the grounds of Florida's DeSoto Correctional Institution, scheduled to open in July 2002.

Public hysteria in reaction to a "sexual predator" on the loose caused five local schools to cancel their bus service. School officials held students on campus and notified their parents that they needed to be picked up.

One local resident said she kept her 8-year-old son and 5-year-old daughter inside the house until Whitsett was captured. "I didn't even go out for a walk this morning," Jane Huntsinger told the *Post*. "It was very nerve wracking knowing [Whitsett] was out there."

After the escape, concerns were raised about security at MTC. The center, which

is operated by the Florida Department of Children and Families (DCF), is adjacent to Martin Correctional Center, a DOC prison. Security inside the treatment center is provided by employees of Liberty Behavioral Healthcare, Corp., a private Pennsylvania company that contracts with DCF to run the facility.

Four DOC guards from the nearby prison were patrolling the MTC perimeter when the escape occurred. But they were not armed because the detainees are technically "residents" under the civil commitment statute rather than "prisoners."

"We are not allowed to use deadly force inside or outside [the center]," MTC director Robert Briody told the *Post*. "We couldn't have shot at him anyway if we had guns." As a result of the escape guards at MPC are now armed.

Two weeks before the breakout, Whitsett shipped most of his belongings home. The weekend leading up to the escape he gave most of his clothes away to fellow "residents," bragging that he'd won his appeal and was going to court Monday to be released. The morning of the escape he even got a farewell haircut.

"In hindsight, that maybe should have risen the staff's suspicions," said a treatment center spokesperson.

At 1:15 P.M. Monday afternoon, Whitsett scaled a 10-foot fence adjacent to the center's basketball and volleyball courts to reach the recreation field where Burkhart was hovering the 1993 Robinson 22 two-seat chopper. Razor wire had been removed from atop that fence three weeks earlier because Whitsett and other MTC "residents" had complained that basketballs and volleyballs popped when they hit the razor wire, officials said.

Minutes after the chopper whisked Whitsett clear of the recreation yard, MTC employees searched his bunk and footlocker. They were empty. No clothes. Not even a toothbrush.

Whitsett and Burkhart were captured after two fruit pickers spotted them running toward a canal and alerted authorities. A sheriff's helicopter rushed to the canal and landed after detecting ripples on the surface. Two heads popped out of the murky water and the 25-hour chase was over.

Martin County Sheriff's Lt. Ron Cucchiara said Whitsett initially refused to put his hands up or come out of the canal.

"I told them I wanted to see some hands," Cucchiara told the *Post*. "[Whitsett] told me he didn't have anything to lose. They told me they wouldn't be taken, and they wouldn't come out of the water."

Cucchiara fired two warning shots into the water. He says Whitsett begged him to kill him and spare him a long prison term. But the two fugitives, after a whispered exchange, finally dropped their 9mm handguns into the water and crawled to the canal bank where they were cuffed.

Burkhart had \$10,098 in cash and a key to an Okeechobee hotel room in his pocket. The two apparently planned to land the helicopter in a field not far from the center. A rented white mini-van was parked nearby. They were to drive to the Okeechobee hotel. Waiting there were barbering tools, fresh clothes and two train tickets from Jacksonville to New York City. They planned to start a new life together and blend into the Big Apple.

Whitsett was charged with escape and Burkhart with aiding an escape. But Assistant Public Defender John Hetherington, assigned to defend Burkhart, said he questions whether the charges will withstand legal challenges.

"They're trying to punish them as criminals under a civil statute," Hetherington said, referring to the Jimmy Ryce Act. "We will be trying to say they are entitled to equal protection as anyone else charged under civil laws such as the Baker Act [for psychological commitments] or the Marchman Act [for substance abuse commitments]. Someone held under [those other acts] who walks away from a treatment center cannot be charged with escape," he said.

Hetherington said that appeals courts will likely be sorting out the issues for years to come. "It's all brand new," he said of the escape charges. "Not to my knowledge has this happened in any other state that has these laws."

Source: *Palm Beach Post*, *Miami Herald*, *Tampa Tribune* ■

## New York Prisoners Have Ad-Seg Liberty Interest

A Federal district court in New York held that prisoners have a protected liberty interest in remaining free from administrative segregation.

On February 11, 1987 New York state prisoner, Santiago Ramirez, was served a Tier Three Disciplinary case for possession of a contraband weapon, namely a pointed steel rod which was found in his cell. Ramirez claimed that the rod was planted by guards in retaliation for grievances he had filed against them. Ramirez was tried by disciplinary hearing officer Michael McGinnis. Based on the testimony of Sgt. DeZayas, who claimed that he had learned of the weapon from an informant, McGinnis sentenced Ramirez to 60 days confinement in Sing Sing's Special Housing Unit, loss of telephone and commissary for those 60 days, and loss of one month of good time credit.

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**the court concluded that prisoners do have a protected liberty interest in remaining free from disciplinary segregation...**

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After losing his original appeal, Ramirez brought an Article 78 proceeding in New York State Supreme Court which annulled McGinnis' determination. The court ruled that Ramirez was improperly denied the right to hear testimony from Sgt. DeZayas and the informant. Ramirez then filed suit under 42 U.S.C. § 1983 against McGinnis claiming a violation of his due process rights. McGinnis moved for summary judgment claiming that he enjoyed absolute immunity and that none of the plaintiff's due process rights were violated. Ramirez responded with a cross-motion for partial summary judgment "asserting that previous Article 78 proceeding in state court precluded litigation of issues previously determined."

A magistrate court "rejected defendant's absolute immunity defense

recommendations. A district court agreed that the defendant did not enjoy absolute immunity but declined to adopt the conclusion that there were no triable issues on plaintiff's claim of due process violations.

Citing *Sher v. Coughlin*, 739 F.2d 77, 81(2d Cir. 1984) and *Gittens v. Lefvre*, 891 F.2d 38, 40 (2d Cir. 1989), the court concluded that prisoners do have a protected liberty interest in remaining free from disciplinary segregation and that *Sandin* does not change the validity of these decisions. The case was set for trial. See: *Ramirez v. McGinnis*, 75 F.Supp.2d 147 (SDNY 1999). ■

## Pregnant OH Prisoner Obtains Abortion

A U.S. District Court enjoined the director of an Ohio prison from denying a pregnant prisoner access to abortion services.

Jane Doe, a pseudonymous female prisoner at River City Correctional Center in Cincinnati, was approximately 6 weeks pregnant when she was incarcerated on July 20, 1999. On July 28, Doe submitted a written request to prison director John Barron for pregnancy termination services. Barron denied Doe's request saying he would not provide such services absent a court order.

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**"right to privacy . . . is broad enough to encompass a woman's decision whether or not to terminate her pregnancy."**

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On August 10, Doe filed a Rule 65 motion in U.S. District Court asking for a Temporary Restraining Order (TRO) and preliminary injunction. Two days later, on August 12, a hearing was held where the court considered four factors to determine whether to grant a TRO or injunction.

Citing *Roe v. Wade*, the court first found the "right to privacy . . . is broad

enough to encompass a woman's decision whether or not to terminate her pregnancy." 93 S.Ct 705, 727 (1973). Second, the court was convinced that a delay would unnecessarily increase health risks imposed on plaintiff who would suffer harm absent the injunction.

Third, the court noted that plaintiff would pay the cost of the medical procedure herself and that defendant would face only a minimal burden in providing plaintiff access to abortion services. Finally, the court found that it was in the public's interest to uphold a woman's right to terminate her pregnancy when it was being arbitrarily denied by prison officials without medical or other legitimate concerns.

The court found that plaintiff prevailed on the four factors and Judge Susan J. Dlott thereupon enjoined prison director Barron from denying Doe access to abortion services. Dlott ordered Barron to transport Doe to a health care provider for pregnancy termination services. Bond was set at \$1. See: *Doe v. Barron*, 92 F. Supp. 2d 694 (SD OH 1999). ■

The Wilson Group

**THOMAS SMOLKA**

# Reconsidering Restorative Justice: The Corruption of Benevolence Revisited?

*Condensed by David Rhys*

*Adapted from an article by Sharon Levrant, Francis T. Cullen, Betsy Fulton and John F. Wozniak which appeared in the journal Crime & Delinquency, Vol. 45 No. 1, January 1999.*

Three decades have passed since the rehabilitative agenda was pushed aside for crime control policies rooted in a "get tough" philosophy. This orientation has led to harsh forms of punishment, including a dramatic increase in incarceration. Even community-based sanctions are "unabashedly fierce," emphasizing rigorous surveillance and the enforcement of increasingly stringent conditions of supervision.

It is tempting to portray the penal harm movement as having achieved complete hegemony over correctional policies. It is a powerful way of thinking with which few policy makers publicly take issue. Penal harm ideology has undermined but not stamped out alternative perspectives.

Surveys of the public reveal that citizens favor early intervention programs over prisons as a solution to crime, are willing to use community sanctions as an option instead of incarceration, and continue to support rehabilitation as an important goal of corrections. In accordance, the space still exists for progressive policies to be put forth which challenge the idea that harming offenders is the only, or the best, means of controlling crime.

In this context, restorative justice is emerging as an increasingly popular alternative to penal harm or "getting tough". The primary focus of restorative justice is on the ways in which crime disrupts relationships between people within a community. In its purest form, it is an informal approach to repair these relationships. Thus, it attempts to hold offenders accountable through both shaming and reintegration processes in hopes of strengthening community bonds and providing crime victims with an opportunity to regain their personal power.

The Vermont DOC has been restructured to include two primary service tracks: the *risk management service track* is designed to provide intensive treatment and supervision to high-risk felony offenders, and the *reparative service track* requires low-risk,

nonviolent offenders to make reparation to the victim and the community. Reparative boards have been instituted in the reparative service track as a means of actively involving community members in the justice process. These boards consist of five citizen-volunteers from the offender's respective community who are responsible for meeting with the offender to develop a reparative agreement that requires the offender to (1) restore and make whole the victim(s) of his or her crime, (2) make amends to the community, (3) learn about the impact of the crime, and (4) learn ways to avoid re-offending.

Two central questions in the restorative justice movement must be explored. First, commentators have pointed out that correctional reforms implemented with good intentions often have been corrupted to serve less admirable goals and interests. Thus despite its benevolent possibilities, will restorative justice programs be corrupted and have untoward, unanticipated consequences? Second, given the current knowledge about changing offender behavior, there is little reason to conclude that restorative justice can have a meaningful effect on recidivism. This latter issue is critical, given that a perceived failure to reduce recidivism contributed to the decline of rehabilitation and boosted the legitimacy of punitive correctional policies in recent years.

## The Corruption of Benevolence?

In the 1970's, many liberals joined with conservatives in rejecting rehabilitation and in endorsing reforms, especially determinate sentencing, that constrained the discretion exercised by criminal justice officials. Believing that these reforms would result in increased justice, liberals largely overlooked the possibility that conservatives would use the rejection of the rehabilitative ideal as a means to achieve their goal of getting tough on offenders. In hindsight, it now appears that the liberals' benevolent hopes of doing justice were corrupted by conservatives who succeeded in passing harsh laws which ultimately increased the punishment and the harm done to offenders.

In endorsing restorative justice, liberals once again are embracing a reform also being trumpeted by conservatives. In doing so, it

seems prudent to consider the lesson of the anti-rehabilitation movement: Progressive sentiments are no guarantee that reforms will not be corrupted and serve punitive ends. There are four possible unanticipated consequences of restorative justice: (1) it will serve as a means of getting tough on offenders; (2) it will not be restorative for victims, offenders, or communities; (3) it will be more of a symbolic than substantive reform; and (4) it will reinforce existing race and class biases besetting the criminal justice system.

## Getting Tough Through Restorative Justice

According to progressive advocates, restorative justice offers potential benefits to offenders, including the opportunity to reconcile with their victims, a less punitive sentence, and the chance for reintegration into society. However, six considerations suggest that restorative justice may not achieve its progressive goals and, in fact, may increase the extent and harshness of criminal sanctions.

*First:* Restorative justice systems lack the due process protections and procedural safeguards that are awarded to offenders in the more formal adversarial system: counsel are generally discouraged from attending mediation hearings and the informality of the system contributes to more lenient rules of evidence.

*Second:* Despite the rhetoric of restoration, offenders may be coerced into participating in the mediation process because of perceived threats of harsher punishment if they refuse to do so. The problem of coercing can be exacerbated if people who normally would not be subjected to state controls through the formal criminal justice process are coerced into participating in restorative justice programming.

*Third:* Restorative justice programs can potentially widen the net of social control. For example, market research in Vermont revealed that citizens wanted the criminal justice system to take minor offenses more seriously. Thus, instead of diverting offenders from intrusive forms of punishment (e.g. electronic monitoring, incarceration), restorative justice may place more control over the lives of non-serious offenders who may have otherwise received no formal supervision.

*Fourth:* If broad changes do not take place to make the system restorative, then restorative justice sanctions will likely increase the supervisory requirements that offenders must satisfy. A survey of offenders participating in Vermont's Reparative Probation Program revealed that offenders perceived the program to be much more demanding than regular probation.

Furthermore, it was discovered that contrary to the program's design, offenders were subjected to both reparative conditions and traditional probation supervision. If subjected to unnecessary sanctions and services, offenders' chances for noncompliance, and hence revocation, are increased. Intensive services are necessary to achieve a significant reduction in recidivism among high-risk offenders, but when applied to low-risk offenders, intensive services have a minimal or positive effect on recidivism. For example, studies on punishment and deterrence based programs, such as intensive supervision, boot camp, *Scared Straight* programs, and electronic monitoring, revealed that these strategies produced slight increases in recidivism. This phenomenon has been called an "interaction effect" in which additional efforts to intervene with low-risk offenders actually increases recidivism. The seriousness of the offense, however, is not consistently related to an offender's risk of recidivism. Thus restorative justice programs run the dual risks of producing the interaction effect in low-risk offenders and of under servicing high-risk offenders.

*Fifth:* As conditions of probation expand through restorative justice programs, the potential that offenders will not meet these conditions also increases. This higher level of noncompliance, combined with heightened public scrutiny and a demand for accountability, will likely result in the revocation of more offenders. For example, the closer surveillance of offenders in intensive supervision programs has led to the increased detection of technical violations. Because of an emphasis on stringent responses to noncompliance, detected violations in these programs have often been followed by the revocation of probation and incarceration. Thus restorative justice programs may not only increase social control within the community but may also result in more offenders being sent to prison because they fail to comply with the additional sanctions imposed within the restorative justice framework.

*Sixth:* Restorative justice may increase punishment if reforms fail to develop policies

and programs that are able to reintegrate offenders into society. Shaming policies are gaining popularity because they can fulfill the retributive aims of the public. There is danger in these policies as they may be wrongly interpreted as a revival of support for public shaming practices, such as the ducking stool and the scarlet letter, without an emphasis on the reintegrative element of community acceptance and support. Absent community acceptance and opportunities for change, offenders may be stigmatized, encouraged to participate in criminal subcultures, and become reinvolved in criminal activity. A primary role for probation and parole officers should be to work with communities in an effort to increase acceptance, support, and opportunities for offenders. However, a study recognized that the success of Vermont's Reparative Probation Boards was hindered by staff resistance to philosophical changes and subsequent changes in operations.

### Conclusion

Although restorative justice is being advocated as a benevolent means of addressing the crime problem, its attractiveness lies more in its humanistic sentiments than in any empirical evidence of its effectiveness. It remains

an unproved movement that risks failure, invites corruption, and perhaps does more harm than good.

Until a complete paradigm shift has occurred, restorative justice policies will potentially inflict additional punishment and increase the social control imposed on offenders, without a reduction in recidivism or other long-term benefits to communities.

[Note by David Rhys] Over 60% of the population at the Southeast State Correctional Facility in Windsor, Vermont is comprised of Furlough, Parole and Reparative Probation technical violators. While a technical violator may receive a sanction of 30-90 days incarceration for their non-criminal technical infraction, most often they are kept for many, many months more, becoming lost in the "red tape" of Corrections administration. To house these short-term violators, offenders with longer sentences (who could take advantage of Vermont's education, work training and other rehabilitative programs) have been shipped to other states and are simply "warehoused" with no chance of rehabilitation or reparation. Is this an efficient use of our "overcrowded" prison space? ■

## FTCA Claims May Be Brought Only Against U.S.

A federal district court in North Carolina held that Federal Tort Claims Act (FTCA) claims could be brought against the United States, but not against the Federal Bureau of Prisons (BOP), a correctional institution, or the institution's medical staff. The court also held that under the FTCA venue was proper in the district wherein the acts or omissions complained of occurred.

On October 4, 1994, federal prisoner Fernando Zapata was informed that he tested positive for purified protein derivation and was treated for that condition. Zapata complained that the medicine was making him sick but staff continued to give it to him.

Zapata's health deteriorated and he experienced difficulty eating, talking, and performing regular bodily functions. Medical staff diagnosed him as psychotic and/or paranoid. Due to his condition, Zapata was transferred on November 4, 1994, to the Federal Correctional Institution in Butner, North

Carolina, then transported to Durham Regional Hospital where he was pronounced dead.

Zapata's mother, Tomasa Lopez, filed an FTCA action in the United States District Court for the Middle District of North Carolina, against the United States Government, the BOP, FCI-Allenwood, and medical staff of that facility, alleging wrongful death and negligent infliction of emotional distress.

The court granted defendants' motion to dismiss the BOP, FCI-Allenwood, and medical staff as defendants, holding that under the FTCA claims may only be brought against the United States.

Observing that venue is proper in the district where the acts and omissions complained of occurred, the court also transferred the case to the Middle District of Pennsylvania because the negligence occurred at FCI-Allenwood which is in that district. See: *Lopez v. U.S. Government*, 68 F.Supp.2d 688 (M.D.N.C. 1999). ■

# Post-Conviction Update

*Prepared by Walter M. Reaves, Jr.*

## Habeas Corpus

Addressing an issue which has not been consistently decided by the circuits, the Fifth Circuit in *United States v. Thomas*, 203 F.3d 350 (5<sup>th</sup> Cir. 2000), held that for purposes of limitations in a §2255 petition, the decision is final when the 90 days for filing a petition for certiorari expires, if no petition is actually filed. The Tenth Circuit reached the same decision in *United States v. Willis*, No. 98-3244 (2/1/00).

In *United States v. Clark*, 203 F.3d 358 (5<sup>th</sup> Cir. 2000), the Court addressed the question of when a federal defendant can attack a prior conviction used to enhance his sentence. The Court held that where the defendant was not in custody on the prior sentence, and had exhausted his state remedies, he could attack the convictions in a proceeding under §2255. The key to this decision is that the defendant had exhausted his remedies in State Court. Had he not done this, the issue could not have been considered. Addressing the same issue, the Seventh Circuit reached a different result. In *Ryan v. United States*, 214 F.3d 877 (7<sup>th</sup> Cir. 2000), the Court held a defendant who was blocked from challenging his state conviction in State Court could not challenge the conviction in a federal habeas petition. In that case, the defendant was no longer in custody on the state case, and therefore did not meet the in custody requirement. A similar issue was considered in *Franklin v. Hightower*, No. 98-6684 (11<sup>th</sup> Cir. 6/19/00). There, the Court held a State Court prisoner could not use §2254 to attack prior convictions used to enhance this sentence, where the challenge to the prior sentence was procedurally defaulted.

Addressing a somewhat technical argument the Court in *Edwards v. Carpenter*, 120 S.Ct. 1587 (2000), considered what a defendant must prove where he is relying on ineffective assistance of counsel to establish a procedural default. The issue in this case was whether ineffective assistance can be relied on where that claim was also defaulted. The Court held that ineffective assistance of counsel claims can be defaulted just as any

other claim. Therefore a defendant must establish the ineffective assistance claim was exhausted before ineffective assistance can be relied on to establish cause for a procedural default. This means that where ineffective assistance is used to establish a default, the ineffective assistance claim must also be separately raised.

Another habeas decision is *Slack v. McDaniel*, 120 S.Ct. 1595 (2000), where the Court addressed a number of technical requirements governing certificates of appealability. The Court held a certificate can be granted where the petition was dismissed on procedural grounds, if the defendant can make a showing that the decision was wrong. The court also addressed successive petitions, in the situation where a first petition was dismissed to allow a defendant to exhaust state remedies. The Court holds that once state remedies are exhausted, another federal petition is not successive, but will be considered as a first petition. The Court also holds that the defendant is not limited to claims raised in the initial petition.

In *Tran v. Lindsey*, 212 F.3d 1143 (9<sup>th</sup> Cir. 2000), the Court held the "clear error" analysis provides an appropriate standard for determining whether a State Court decision represents an unreasonable application of federal law. The Court reviewed the decision in *Williams v. Taylor* and noted that Congress intended to take a middle ground approach to the deference given to State Court decisions. Reversal is required when the Court is left with a "definite and firm conviction" that error has been committed. In applying that test, the Court held that circuit precedent may provide authority for determining whether a State Court decision is an unreasonable application of Supreme Court law, and may also be helpful in determining what law is clearly established.

The Seventh Circuit recently addressed the calculation of time periods under the AEDPA. In *United States v. Marcello*, 212 F.3d 1005 (7<sup>th</sup> Cir. 2000), the Court adopted the anniversary method of calculating due dates. Thus,

if a petition for certiorari was denied on December 1, 1997, the petition would be timely if it was filed on December 1, 1998.

The debate over when the statute of limitations begins to run for federal prisoners was continued in *United States v. Garcia*, 210 F.3d 1058 (9<sup>th</sup> Cir. 5/2/00), and *United States v. Torres*, 211 F.3d 836 (2000). In *Torres* the Court held the statute begins to run when the mandate is issued if a petition for certiorari is not filed. The Ninth Circuit adopted the more lenient rule which does not start the statute until the time for filing a petition for certiorari has expired. That decision is in line with the Tenth Circuit and the Fifth Circuit. See: *United States v. Birch*, 202 F.3d 1274 (10<sup>th</sup> Cir. 2000); *United States v. Gamble*, 67 F.2d 155 (5<sup>th</sup> Cir. 2000).

What constitutes a second or successive petition was addressed in *United States v. Orozco-Ramirez*, 211 F.3d 862 (2000). The defendant's first writ alleged ineffective assistance of counsel, which denied him a direct appeal. The Court held that claims which could have been raised in that petition would be second or successive. There was nothing to prevent the defendant from raising other claims in the first writ, and therefore they would be barred. Thus, even where the main claim is the denial of an appeal, all other issues must also be raised.

Habeas relief was granted based on the improper granting of a motion for mistrial in *Johnson v. Karnes*, No. 98-3099 (6/12/99). The trial court had granted a motion for mistrial after defense counsel asked the complaining witness whether he was aware the defendant had been acquitted of aggravated robbery. A mistrial is appropriate only when there is a manifest necessity to do so. In reviewing the issue on habeas, the Court held that it must ensure the trial court exercised sound discretion. The trial court failed to do so here, by not seriously considering other alternatives. This case is significant because it does not defer to what is basically a mixed question of fact. Instead, the Court fully reviewed the issue, and determined the trial court decision was not correct.

## Sentencing

The First Circuit recently addressed the question of when the inclusion of relevant conduct requires the court to impose concurrent sentences. In *United States v. Caraballo*, 200 F.3d 20 (1<sup>st</sup> Cir. 1999), the Court held the critical inquiry is whether the relevant conduct was fully considered. Where such conduct did not increase the defendant's sentence, it was not fully considered, and the Court was free to impose consecutive sentences.

A victory for the defense in the Supreme Court came in *Castillo v. United States*, 120 S.Ct. 2090 (2000). The defendants were convicted of using or carrying a firearm in relation to a crime of violence. Their sentence was based on using a machine gun during the crime, which raised the sentence to 30 years. The Court held that was an element of the offense, which should have been presented to the jury.

### Ineffective Assistance

The Supreme Court recently set forth the obligations counsel has in advising his client about the right to appeal. The lawyer has a duty to consult with the defendant when there is a reasonable basis to conclude that a rational defendant would want to appeal, or the defendant had demonstrated his interest in appealing that case. Where counsel consults with his client he will be ineffective only if he fails to follow the client's instructions. To establish prejudice, the defendant must establish only that he would have appealed, and is not required to establish the merits of the appeal. *Roe v. Ortega*, 120 S.Ct. 1029 (2000).

Addressing an issue which has been somewhat confusing, the Court in *Purdy v. United States*, 208 F.3d 41 (March 27, 2000), held that a defense lawyer does not have to advise their client whether to plead guilty. The attorney discharged his burden by advising the defendant of the difficulties of establishing innocence, and making him aware of the evidence the government had against him. The court distinguished the decision in *Boria v. Keane*, which had held that a lawyer must advise the defendant as to whether they should plead guilty. The Court noted that the difference in sentencing between going to trial and taking a plea was not as great in this

case. The court also noted that the chances of acquittal were not as hopeless as they were there. Therefore, it is still an open question as to when a lawyer must advise a defendant on what plea to enter.

An interesting ineffective assistance case is *United States v. Fernandez*, No. 98-Cr-961 (S.D.N.Y. 5/3/00). There, the court found counsel ineffective for failing to advise the defendant of the importance of cooperating. The attorney had a conflict of interest, caused by the person paying the legal bills. The question was what remedy was available. The Court ultimately concluded that the only remedy was to give the defendant the sentence he likely would have received had he cooperated. This case could be significant, because it recognizes the importance of seeking cooperation agreements in certain cases where that may be the only strategy available.

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**Their sentence was based on using a machine gun during the crime, which raised the sentence to 30 years. The Court held that was an element of the offense, which should have been presented to the jury.**

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In *Amiel v. United States*, 209 F.3d 195 (2<sup>nd</sup> Cir. 2000), the defendant alleged her lawyer had a conflict of interest because he also represented her mother, who was paying the legal bills. She alleged that she wanted to testify, but was prevented from doing so because her lawyer was concerned about the effect that would have on the mother's case. The Court held there is an actual conflict of interest if the interest of the attorney and his client diverge with respect to a material fact or legal issue. To obtain relief the defendant need only show that some plausible defense strategy or tactic was not pursued because of the conflict.

The Supreme Court dealt with the adequacy of *Anders* briefs in *Smith v. Robbins*, 120 S.Ct. 746 (1/19/00). The Court noted that states have a substan-

tial amount of leeway in determining how counsel should handle claims which they do not believe have any merit. Under the procedure here, counsel merely filed a brief that summarized the procedural and factual history with citations to the record. Counsel then asked the court to independently examine the record to determine the existence of arguable issues. Counsel does not withdraw, nor suggest the appeal is frivolous. The Court held that procedure is a sufficient. In doing so, the Court noted the ethical obligation a lawyer has to represent his client which is often compromised when a lawyer basically argues against his client's interest. On the other hand, the procedure here places a substantial obligation on the court to independently review such cases.

### Other Cases

The Second Circuit granted relief in a habeas case involving a *Batson* violation in *Jordan v. Lefevre*, 206 F.3d 196 (2<sup>nd</sup> Cir. 2000). There, the lawyer objected to the prosecution's use of peremptory challenges against three black jurors. Before allowing the lawyer to make an argument, the judge asked the prosecutor to explain the reason for his strikes. The Court then overruled the motion without seeking further input from the lawyer. The Court held the trial court did not conduct a meaningful inquiry into the issue, and granted relief.

The Fifth Circuit recently held that a trial court impermissibly participated in plea bargaining by exerting pressure on the defendant to accept a plea agreement. In doing so, the Court noted that rule 11 is not limited to situations where the trial court somehow influences the terms of a plea agreement. *United States v. Rodriguez*, 197 F.3d (5<sup>th</sup> Cir. 1999).

The Supreme Court struck down an Eleventh Circuit decision dealing with the retroactive application of rules governing parole applications. In *Garner v. Jones*, 120 S.Ct. 1362 (2000), the Eleventh Circuit held that Georgia could not retroactively apply rules which lengthened the time between parole hearings. The Supreme Court held the Eleventh Circuit did not properly analyze the issue, and reversed. In doing so, the Court reiterated that *Ex post facto* is limited to situations where punishment is increased. In *Smith v. Groose*, 205 F.3d 1045 (8<sup>th</sup> Cir. 2000), the Court held that due process

## Update (cont)

was violated where the prosecutor used contradictory theories to obtain convictions against two defendants. In one case, the state argued the victim was killed by one of the defendant's partners. In another case the state argued the murder was committed by a second group. The court concluded the prosecutor improperly manipulated evidence, which rendered the defendant's trial fundamentally unfair.

One of the few claims remaining which do not require a strict harm analysis are Rule 11 violations. In *United States v. Hernandez-Fraire*, 208 F.3d 945 (11<sup>th</sup> Cir. 2000), the Court failed to advise the defendant of his right to the assistance of counsel, the right to confront and cross-examine witnesses, and the right against compelled self-incrimination. The Court noted that Rule 11 should be strictly followed, and refused to rely on past experience with the criminal justice system to establish the error was harmless.

Another victory for the defense in the Supreme Court came in *Carmell v. Texas*, 120 S.Ct. 1620 (2000). There the defendant had been convicted of sexual assault involving a child over 14. At the

time the offense was committed, Texas law required corroboration for a victim that was over 14. The law was subsequently changed to delete the corroboration requirement for victims under 18. The defendant was tried after the law changed, and was convicted solely on the testimony of the victim. The Court held that application of the amended statute violated the *Ex post facto* clause of the Constitution, because it lowered the proof required to obtain a conviction. This is a significant decision, because the Court had previously indicated that the *Ex post facto* clause applied only to statutes which created offenses out of otherwise innocent conduct, or increased punishment. Thus, the concept of *Ex post facto* appears to have broadened.

A significant jurisdictional case is *Jones vs. United States*, 120 S.Ct. 1904 (2000). There, the Court held that the arson of a private residence cannot be prosecuted in federal court. There must be some active use of the property in interstate commerce, as opposed to some passive or past connection to interstate commerce. The Court holds that obtaining a mortgage, insurance, and utilities is not sufficient.

A common defense trial tactic was impacted by the decision in *Ohler v. United States*, 120 S.Ct. 1851 (2000). There, the defendant challenged the admissibility of his prior convictions. That challenge was unsuccessful, and the defendant then sought to minimize their impact by bringing them up on direct examination. The Court held that by doing so, the defendant waived his right to challenge the court's ruling.

Public trial — *Gonzalez v. Quinones*, 211 F.3d 735 (2nd Cir. 2000). In this case, the trial was closed for a short period of time due to a misunderstanding of the security officers. The closure lasted several hours, during which testimony was offered. The Court holds that was not so trivial as to not constitute a Sixth Amendment violation. Therefore, relief would be granted unless the state can establish a justification for the closure.

The court found an unlawful delegation of authority to the probation officer in *United States v. Kent*, 209 F.3d 1073 (4<sup>th</sup> Cir. 19/00). The court had ordered the defendant to participate in psychiatric counseling as directed by the probation officer. Whether such counseling was

necessary was left to the probation officer's discretion. The Court held that such authority should not be delegated. The Court also held that the requirement for counseling was not supported by evidence suggesting that it was necessary or desirable.

In *United States v. Harrison*, 213 F.3d 1206 (9<sup>th</sup> Cir. 2000), the Court held that a defendant's ongoing relationship with his lawyer can invoke his right to counsel. Here, the defendant retained a lawyer to represent him in an investigation which subsequently led to charges being filed. He was arrested after the indictment was issued, and questioned. The Court held the ongoing representation could be considered in determining whether the defendant invoked his right to counsel. Because the lawyer had been actively involved in the investigation, the Court held that questioning the defendant without counsel present violated his right to counsel.

An interesting case involving translator is *United States v. Martinez-Gaytan*, 213 F.3d 890 (2000). There, the defendant challenged the reliability of the translation of his statement. The Court held that a court should not rule in such case without hearing the testimony of the translator, and allowing the defendant to cross-examine them.

A significant blow to defendants hoping to establish error in jury selection was dealt in *United States v. Martinez-Salazar*, 120 S.Ct. 774 (2000). There, the defendant argued that the trial court erroneously refused to grant a challenge for cause. He argued a due process violation based on the impairment of his peremptory challenges, since he was forced to use a challenge on the juror. Some courts have considered that to be a structural error requiring automatic reversal. The Court held there was no constitutional violation. The defendant had the choice to either use a peremptory challenge to remove the juror, or allow the juror to serve and take the issue up on appeal. By using a peremptory challenge, he essentially waived the right to challenge the juror for cause. The court had already held that there is no constitutional right to peremptory challenges. Thus, the ability to obtain reversal on an erroneous challenge for cause is now sharply limited. ■

[Walter Reeves, is a criminal defenses attorney in, Texas.]

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## NY School-Age Prisoners Entitled to Educational Services

New York City school-age prisoners were granted declaratory judgment establishing defendants' liability for failure to provide adequate general and special educational services to class members at the Rikers Island facility.

Plaintiffs in this class action §1983 suit are 16- to 21-year-old prisoners in the custody of the New York City Department of Corrections (DOC) at 16 jails including 10 facilities on Rikers Island. The majority of the class members are pre-trial detainees; others are serving sentences of up to one year. Defendants are the DOC, the New York City Board of Education, city officials, and the State Education Department Commission.

Plaintiffs estimate that approximately 2,800 imprisoned children were eligible for educational services when the case was filed in 1996. They complain that class members received limited or no educational services

for significant periods of time, that approximately 40% of the class required special education due to disabilities, and that DOC violated the Individuals with Disabilities in Education Act (IDEA), 20 U.S.C. §1400, the Americans with Disabilities Act (ADA), 42 U.S.C. §12101, the New York State Constitution, statute law, and regulations.

Defendants sought to have plaintiffs' claims dismissed for failure to exhaust administrative remedies as required by the Prison Litigation Reform Act (PLRA). The court ruled that the PLRA did not require plaintiffs to pursue the grievance procedure when the relief sought was outside the jurisdiction of the DOC.

The court found that New York law creates an entitlement to education for all children age 5 to 21. The fact that a child becomes incarcerated does not imply that he or she has forfeited the entitlement to education. Similarly, the entitlement to special education services is not trumped by incarceration. IDEA requires school districts to identify all youngsters with disabilities and develop an education plan tailored to meet that child's needs.

## County Jail Time Returned to CO Lifers

The Colorado Supreme Court has held that prisoners sentenced to life imprisonment are entitled to presentence confinement (PSC) credits for the time they spent in the county jail before sentencing.

Until 1977, life sentences in Colorado were a minimum of ten years to parole eligibility. From 1977 to 1985, this minimum was twenty years; and from 1985 to 1990, forty years. From 1990 on, life sentences are without parole. See: C.R.S. §17-22.5-104.

In 1987 the Colorado Court of Appeals interpreted this statute to mean life sentences begin at sentencing. See: *Derrick v. Colorado Board of Parole*, 747 P.2d 969 (Colo. App. 1987) (10-year life). The Colorado Department of Corrections then revoked all lifers' PSC credits. In 1997 this issue was again before the Colorado Court of Appeals. Relying on *Derrick*, the Court denied relief. See: *People v. Payseno*, 954 P.2d 631 (Colo. App. 1997) (20-year life).

While the Colorado Supreme Court declined to review the *Derrick* and *Payseno* decisions, they did agree in 1999 to treat the state habeas corpus appeal of Paul Fields on this issue as a petition for a writ of mandamus. The Court then harmonized C.R.S. §17-22.5-104, governing parole eligibility for

lifers, and C.R.S. §16-11-306, governing PSC credits. The Court first noted critical differences between *Derrick* and *Payseno* in that *Derrick* held the references in C.R.S. §17-22.5-104 to "calendar years" to mean the legislature did not intend these years to be reduced by any type of credits, including PSC credits. *Derrick* was sentenced in 1975 before PSC credits were mandated by the 1979 amendment to C.R.S. §16-11-306. Conversely, *Payseno* was sentenced after the 1979 amendment and the Appellate Court there "failed to take account of this critical change in the [PSC] credit statute."

The Supreme Court then overruled *Payseno* and held that the PSC statute did not conflict with the life sentence statute and that PSC is required to be credited to lifers. This credit is "day for day" and thus does not violate the "calendar years" mandate since both forms of time are "straight time." The Court also noted that indigent prisoners not able to post bail will be "treated more harshly" than prisoners who post bond and that this "raises equal protection concerns." See: *Fields v. Suthers*, 984 P.2d 1167 (Colo. 1999) ■ [also: The Tenth Circuit held in *Hall v. Furlong*, 77 F.3d 361 (1996), that the Equal Protection Clause mandates the grant of full credit toward the maximum sentence.]

Under any reasonable interpretation of the relevant laws, defendants prevented the plaintiff class members from enjoying their entitlement to a free and appropriate education. The court therefore granted plaintiffs' motion for declaratory judgment establishing defendants' liability for failure to provide adequate educational services. The court also ordered defendants to file a plan for providing full and complete educational services for all eligible prisoners at Rikers Island. see: *Handberry v. Thompson*, 92 F. Supp 2d 244 (SDNY 2000). ■

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## Detainee's Excessive Force Claim Requires Trial

The Federal District Court for the Southern District of New York denies dispositive motion to dismiss excessive force and religious discrimination retaliation claims brought against Putnam County Jail Sheriff and two guards by pretrial detainee Kareem Ali.

Ali alleged that while he was using a microwave to warm his coffee and pizza, guard Dalo ordered him back to his cell to complete a term of cell detention; that he complied with the order immediately, but while returning to his cell, guards Dalo and Szabo viciously attacked him causing painful bruising and swelling to his hand. Guards Dalo and Szabo alleged that Ali was the aggressor and that they only used force sufficient under the circumstances.

Excessive force claims brought by a post-arraignment, pre-conviction pretrial detainee must be analyzed under the Fourteenth Amendment's substantive due process standard. The test there is whether the conduct shocks the conscience. Applying the facts in the light most favorable to Ali, the court concluded that a material issue of fact existed as to whether the force used was excessive. If Ali was the aggressor, then the force may be justified. However, if Ali was complying with the order, the force used would not be justified. Because the need for the application of force is a material fact issue that remained in dispute, summary judgment was unwarranted.

Ali further alleged that when he obtained forms for filing a suit, the Sheriff retaliated by adopting a rule prohibiting the wearing of a Kuif. The Sheriff did not deny the existence of the regulation, nor did he offer any explanation for imposing it. The proper standard for determining whether a prison regulation impermissibly impinges on inmates' constitutional rights is whether the limitation is reasonably related to a legitimate penological interest. Because Ali alleged that regulation was retaliatory and

because it cannot be said as a matter of law that the restriction does not further a legitimate penological goal, a fact issue existed as to the validity of the rule, otherwise prohibiting the grant of summary judgment. It should be noted that this decision is not a ruling on the merits. See: *Ali v. Szabo*, 81 F.Supp2d 447 (S.D.N.Y. 2000). ■

## Male NJ Guards Sexual Harassment Suit Settled for \$425,000

On December 6, 1999, the New Jersey Department of Corrections agreed to pay \$425,000 to Mid State Correctional Facility employee Thomas Ferri, 55, to settle his sexual harassment suit against the prison. Ferri, an internal affairs investigator at the prison, claimed he was sexually harassed by his supervisor, Deborah A. Davey, the chief of the prisons internal affairs unit. Ferri claimed Davey would remove her undergarments in his presence, use obscene language and make uncomplimentary remarks about his genitals.

After Ferri filed a civil rights suit alleging he was subjected to a hostile work environment, Davey retaliated by transferring him to a state prison in Trenton, ransacking his office, taping his calls and threatening him.

As part of the settlement the state of New Jersey admitted to no wrongdoing and Ferri agreed to retire.

Sexual harassment claims by men are sometimes referred to as "reverse discrimination" suits and comprise about 15% of all sexual harassment suits. The largest jury verdict ever awarded in a "reverse discrimination" suit involved Robert Lockiey, a guard at the same prison in New Jersey who was awarded \$3.75 in damages and \$900,000 in attorney fees after he proved he was sexually harassed by a female guard at the prison and retaliated against by supervisors when he complained.

[PLN, Dec. 1999]. Source: *Courier-Post* ■

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## Inmate Classified

# Slave Labor Supplanting Welfare State

By Ronald Young

Texas has a history rooted in the Southern antebellum traditions of religion and slavery. One of the cornerstones of Texas governor and presidential hopeful George W. Bush's "compassionate conservatism" is what he calls faith-based social programs. Bush is of the belief that religious organizations are best suited for delivering human services to the poor.

In modern day Texas, many of these faith-based organizations receive foodstuffs from regional food banks for distribution to the needy. And in keeping alive Texas' rich Southern heritage, slave labor-prison slave labor-is being used in conjunction with the food banks to glean, harvest, and prepare food for the state's hungry masses.

Though Texas is ranked 47<sup>th</sup> among the 50 states for delivery of social services, and 50<sup>th</sup> in overall per capita spending, it is 9<sup>th</sup> in per capita spending for prisons, according to *The Nation*. Texas incarcerates more of its residents — 7.2 per 1,000 — than any other state. While the Lone Star State continues to cut welfare rolls, revenues for operating the massive prison system have grown to approximately \$2.6 billion annually.

Currently the Texas Department of Criminal Justice (TDCJ), which operates the state's prisons, state jails, and paroles division, is participating with food banks throughout Texas on several major projects. The largest of these projects are Texas Fresh Approach, Texas Gleaning Program, Unit Garden Food Bank Projects, and Texas Second Chance. The food bank programs have grown over the past five years even as state officials claim that the robust economy has caused a dramatic decrease in welfare recipients.

According to a report by the Agribusiness, Land and Minerals Division of the TDCJ, Texas Fresh Approach was provided with 1.1 million pounds of vegetables for the eleven month period reported for 1999. Prison slaves from twelve prisons and two state jails were forced at gun-point to harvest this abundant crop that found its way to seven different food

banks across the state. For their part in this charitable act, Texas prisoners worked in "hoe squads" under some of the most brutal and extreme conditions imaginable. Working in temperatures approaching 100 degrees, these slaves of the state are afforded few water breaks as horse-mounted, gun-totting prison guards keep the work pace fast and furious. Though many prisoners succumb to exhaustion and the searing Texas heat, not one receives so much as a penny for their hard labor.

The Texas Gleaning Program uses prison slaves to harvest private fields of fruits and vegetables that would otherwise be destroyed. Continued expansion of this program is planned in the South Texas and Rio Grande Valley areas. These are depressed areas of the state where chronic unemployment hovers at around 20-25 percent despite the so-called "hot economy." No less than two dozen new prisons and state jails constructed in recent years are located in these areas, thus providing an endless slave labor force — the slave laborers *gleaned* substantially from the ranks of unemployed residents.

The Houston Food Bank alone received 3.7 million pounds of various fruits and vegetables through these gleaning operations. Coming in at a distant second was the Food Bank of the Rio Grande Valley which benefited by the receipt of 2.4 million pounds of slave-gleaned produce. The combined total of the gleaning operations for the first eleven months of 1999, was 6.4 million pounds of fruits and vegetables.

Several prisons and state jails across the state participate in Unit Garden Food Bank Projects. Vegetables from this program are supplied to a wide spectrum of nonprofit organizations, from senior citizen centers to children's homes. Participating groups supply the seed and fertilizer, and the state supplies the slaves who grow and pick the produce. For the reported eleven month period of 1999, 275,641 pounds of fresh vegetables were provided to eight of these nonprofit organizations.

The Texas Second Chance Program provides slaves from the state's

gulags in the form of trustees who labor in the warehouse facilities of the various food banks. During the first eleven months of 1999, over 63 million pounds of food was received and distributed by prisoners working in this program.

In January 2000, the Texas Community Kitchen Project began in Dallas to supposedly provide culinary skills training to prisoners from the local Dawson State Jail while providing prepared food for local faith-based agencies to assist in feeding the needy.

What is wrong with this picture? Shouldn't prisoners be made to pay their debt to society by participating in such charitable works as these? On the surface it may seem so, but much more is at work here than meets the eye. Conservative politicians, even so-called "compassionate" ones, would like for the taxpayers to view these slave operations in just such narrow terms. In reality, the poor are being herded into the state gulags at an alarming rate. Their slave labor is then used to provide an obscene form of social welfare which also indentures the free-world needy into workfare peonage. The overall goal appears to be to extract as much slave labor off the backs of the poor as possible, while reducing unemployment and providing subsidized housing in the form of prisons.

TDCJ Agribusiness, Land and Minerals began another partnership in January 1999. The Interagency Cooperation Contract between the TDCJ and the Texas State Soil and Water Conservation Board (TSSWCB) uses supervised prison slaves in brush clearing gangs on lands that the TSSWCB has identified as having potential to increase watershed yield and increase available supplies of state water. It is the intention of this project to exploit prison slave labor under the guise of "public service" and displace waged employee positions. Currently the Wallace Unit at Colorado City and the San Angelo work camp are providing prisoners to grub cedars and other foliage to control brush and increase the ground water supply in West Texas. ■

# Texas Prisons Heat Up As Parole Hopes Fade

*By Ronald Young*

The summer continued to heat up in the Texas prison system even before the season officially began.

On May 5, 2000, guards at the Stiles prison near Beaumont overpowered an armed male prisoner after he briefly held two female medical workers hostage in a failed effort to obtain money and cigarettes. Robert Richardson, 32, is serving a life sentence plus twenty-five years for burglary, assault, and possession of a weapon in a penal institution. During negotiations, Richardson told prison officials he wanted \$100 cash, cigarettes-which are banned at all Texas prisons-and improved conditions of confinement, said TDCJ spokesperson Larry Todd.

Richardson was holding the hostages in a glass-walled psychiatric evaluation room when prison guards fired tear gas into it as he attempted to release a hostage. Two prison guards and Assistant Warden Rick Thompson sustained stab and slash wounds which were described as not life threatening.

During a one week period in early June, two prison guards on the Connally Unit near

Kennedy were hospitalized after being attacked by prisoners in two separate incidents.

On June 7, 2000, Irene Fonseca, 35, a prison guard at the Connally Unit, was attempting to confiscate a contraband coffee pot that prisoner Bryan Thomas was allegedly using to hide food and toiletries in excess of what the prison allowed. Thomas, 40, beat Fonseca unconscious. She suffered fractures and severe swelling around the brain, and had most of her teeth knocked out. She is expected to recover. Thomas is serving a life sentence for raping and beating a 91 year old woman whose home he broke into in March 1990.

On June 13, 2000, prison guard Scott Jendrzey, 21, was escorting a group of prisoners to the Connally Unit chow hall when one of the prisoners, 20 year old Rayland Ladon Tyner, stabbed him six times with a sharpened 9" piece of metal, authorities said. Jendrzey was treated at an area hospital for his injuries and was also expected to recover. Officials said Tyner arrived at the facility in October

Paper wings 1/6 page -----

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**1/2 page**

1999, to begin serving a sixty-five year sentence for aggravated robbery.

According to the San Antonio *Express-News*, the number of assaults on TDCJ prison guards increased to 2,044 in 1999. That was up from 1,674 in 1998 and more than double the 918 staff assaults reported in 1996.

1996 was the first year a Texas law went into effect which ended the use of good time credits and mandatory early release for prisoners with new convictions for crimes committed on or after September 1, 1996. There appears to be a correlation between the skyrocketing assaults and draconian parole laws which cannot be ignored. In Tyner's case, for instance, he will have to do three hundred twenty-two years just to become eligible for parole.

When you take away the carrot, there's not much incentive left for prisoners doing hard time to refrain from using the stick. The increasing incidence of assaults on TDCJ prison guards is just a harbinger of worse things to come in a prison system that grows increasingly vicious under George W. Bush's oppressive policies. ■

## Disabled Prisoner Survives Summary Judgment

A federal district court in Kansas held that jail officials were not entitled to qualified immunity with respect to their treatment of a double amputee prisoner, and denied defendant's motion for summary judgment on all claims.

Tracy Schmidt, without both legs below the knees, was confined in Cowley County Jail in Kansas for approximately nine months. During that time, he was denied a wheelchair and other accommodations for his disability, forcing him to crawl and pull himself about the jail on the floor which caused him pain and humiliation.

Schmidt filed suit, alleging that jail officials violated the Eighth Amendment, the Americans with Disabilities Act, (ADA), the Rehabilitation Act of 1973 and the state law tort of intentional infliction of emotional distress. Defendants then filed a motion for summary judgment.

The court denied defendants' motion for summary judgment on plaintiff's Eighth Amendment claim, concluding that a reasonable jury could find that defendants' treatment of Schmidt fell short

*PLN* previously reported that Florida's Martin Correctional Institution (MCI) had been evacuated as a result of bad water. [See *PLN*, May, 2000: *Bad Water Causes Florida Prison Evacuation*.] That report was based solely upon media reports that relied exclusively upon misinformation by MCI officials.

### **They were given an eight ounce cup of water, and taken to the portable toilets, once every eight hours.**

The media was unable to report that bad water at MCI was a daily fact for over 7 months preceding the October, 1999 evacuation. In March, 1999 MCI officials placed a sign at the employee/visitor entrance informing them not to drink the water at MCI. To make this possible offi-

The court rejected defendants' claim of qualified immunity, concluding that the constitutional prohibition against deliberate indifference to the medical and other basic needs of prisoners was clearly established at the time in question.

The court denied summary judgment with respect to plaintiff's ADA and Rehabilitation Act claims, finding that plaintiff cited evidence that he was denied the benefits of some of the jails' basic services because of his disability. Accordingly, the court concluded that a genuine issue of fact existed as to whether the defendants failed to make reasonable accommodation for plaintiff's disability.

The court also denied summary judgment with respect to plaintiff's state law claim, finding that there was sufficient evidence from which a jury could find that the defendants were deliberately indifferent to his basic needs and inflicted unnecessary pain and humiliation upon him while he was in their custody. See *Schmidt v. O'Dell*, 64 F.Supp.2d 1014 (D.Kan.1999). ■

## Without Running Water

*By David M. Reutter*

cially installed bottled water dispensers in the guard stations, and sold bottled water in the visiting park vending machines. Prisoners were not informed of the bad water, and bottled water was not available in the prisoner canteen.

As a result of the bad water there were periodic epidemics of diarrhea among the prisoners.

The general population cells at MCI have white ceramic toilets that are used by the prisoners to determine if the water is safe to drink. If the water had a yellowish tint, it was a bad water day. Boiled water notices were a regular event at MCI, regularly put out two days after the water turned yellow. No facilities are available to MCI prisoners to boil water and attempts to do so with homemade utensils resulted in disciplinary action. Bottled water would be brought into the dormitories when MCI went on boiled water status. However, only one-five gallon bottle was brought in every eight hours for each quad, which houses 56 prisoners.

Prior to officials evacuating MCI on October 26, 1999, the prisoners endured three days of boiled water status. No running water was available during that period. This meant that there were no showers, toilet flushing or laundry services. Portable toilets were not set up until the morning of the emergency evacuation.

When MCI was evacuated, only the 700 open population prisoners were transferred. There were nearly 500 prisoners housed in MCI's administrative, disciplinary and close management units who were not evacuated. Those prisoners endured a two week period without running water in their cells. They were given an eight ounce cup of water, and taken to the portable toilets, once every eight hours.

Water quality at MCI is still in question as the institution run water treatment plant is bypassing the filtration system and is only chlorinating its water. ■

[Reutter is a *PLN* subscriber incarcerated at MCI]

## News in Brief

**Australia:** On August 28, 2000, 100 Afghan and Iraqi asylum seekers rioted at the Woomera detention center and set fire to four buildings. The detainees are seeking political asylum after arriving illegally in the country. News services did not report the causes of the uprising.

**Brazil:** On August 17, 2000, a clash between rival gang members in a maximum security prison in the nation's capital of Brasilia left 11 dead and 2 wounded. On August 13, 2000, a suspected drug dealer was killed and his fellow gang members decided to avenge his death. According to Cicero Antonio de Araujo, the prison's security director, rioting prisoners seized the prison yard, killing 11 prisoners, stacked the bodies in a bathroom and set them on fire using old mattresses as kindling. De Araujo noted that some of the "dead" may have been burned alive. Several hundred riot police later stormed the prison and restored order.

**CA:** On August 28, 2000, Lee Beck, a San Quentin prison guard was jailed on assorted drug charges stemming from his smuggling of drugs into the prison. Beck's arrest was the result of a California Department of Corrections internal affairs investigation. Beck is the vice president of the San Quentin chapter of the powerful California Correctional Peace Officers Association, the union which represents prison guards. Asked for comment, CCPOA spokesman Lance Corcoran simply said Beck was presumed innocent and had been a loyal CCPOA advocate in the past. The CCPOA has successfully opposed CDC plans to search guards for contraband on a regular basis.

**CT:** On August 3, 2000, John Barletta, a prisoner at the Northern Correctional Institutions control unit slashed prison warden Lawrence J. Myers and major Michael LaJoie with a razor shank. Prison guards Frederick Hanning, Peter Kuhlmann

and Jerry Wawrzyk received cuts and bruises while struggling with Barletta. Myers was cut on the face and LaJoie was cut on the arm and fingers. Barletta was in the prison's control unit after he strangled his cellmate at the Garner Correctional Institution on March 17, 1999, Kenneth Briggaman, 28. Briggaman had decided to use the toilet in their cell while Barletta was eating a soup. Barletta killed Briggaman and then told guards to "get this dead motherfucker out of my cell." Barletta was convicted of Briggaman's murder. Asked by state police why he had attacked Myers, Barletta said it was because guards had confiscated a white supremacist bible from him and Myers refused to return it. Barletta was also upset that he was not allowed to have a TV while prisoners on death row in the unit were. Interviewed on video by state police Barletta said "I got the motherfucker" and showed his middle finger to the interviewer.

**El Salvador:** On August 21, 2000, six prisoners were seriously injured after being attacked by a group of prisoners at the Usulután prison. The victims were attacked by armed prisoners in retaliation for insulting prison visitors and demanding money from them. The injured prisoners were later placed in protective custody.

**FL:** On August 14, 2000, Abelardo Silva, 45, a prisoner at the South Florida Reception Center, refused to go to breakfast. When prison guard Mario Rodriguez tried to force Silva to go, Silva broke his wrist. Rodriguez suffered cuts to his face, head and chest. Another guard, Mario Corrales, also suffered minor injuries. Silva had recently been convicted of battery on a law enforcement official.

**FL:** On September 5, 2000, a federal grand jury indicted Gerald Timms, 39, a Martin Correctional Institution prisoner on three counts of receiving child pornography by mail. Timms wrote to U.S. postal inspectors posing as pornographers and ordered photos of children engaged in sex acts. The photos were duly delivered to Timms in April, 2000, by prison officials cooperating in the in-

vestigation. Timms, serving a sentence for rape and second degree murder was scheduled for release from state prison on October 22, 2000.

**KS:** On August 14, 2000, Billy Holler, 33, a guard at the Corrections Corporation of America prison in Leavenworth, pleaded guilty in federal court to one count of attempting to possess cocaine with intent to deliver. Holler had told a policeman posing as a drug dealer that he was willing to deliver crack cocaine to prisoners at the CCA facility and had done so before.

**Kenya:** On September 5, 2000, 6 naked death row prisoners were shot and killed while attempting to escape from the King'ong'o maximum security prison in Nyeri. The prisoners had used their prison uniforms to make a rope which they used to scale the prison's 25 foot wall at 2:00 AM. Two prisoners successfully escaped. All 8 prisoners had been sentenced to death for armed robbery. Kenya has 2,000 prisoners sentenced to death but has not carried out any executions since 1985. Prison officials are investigating the escape itself as well as whether guards used excessive force.

**NV:** On July 23, 2000, rap singer Ice T performed a concert at the 1,500 bed medium security Southern Desert Correctional Center. Ed Flagg, president of the Nevada Corrections Association, denounced the concert, claiming "It shows a complete lack of respect for the officers who work in the prisons on a daily basis with these inmates." Ice T was the subject of controversy in the early 1990's for releasing a song called "Cop Killer." Under police pressure, Ice T withdrew the song from his albums. With no sense of irony, Ice T has made his movie career by favorably portraying policemen.

**NY:** On August 13, 2000, Arthur Alalouf, 47, shot four New York city policemen and was later killed by police after he bought a shotgun and assault rifle and told his parents he would kill the first policeman he saw. Alalouf had

been employed as a jail guard on Rikers Island during the years 1982 through 1984. He had a history of mental illness and had not been employed since leaving the jail guard position.

**NY:** On August 21, 2000, federal prosecutors in Brooklyn indicted George Gallego and Hamed Elbarki, prisoners at the Federal Correctional Institution in Allenwood, Pennsylvania, on charges of defrauding their fellow prisoners. Also charged was James Gallego, George's brother and a New York city policeman. Prosecutors claim that George and Elbarki told other prisoners they knew a corrupt Drug Enforcement Agency Agent who could get them out of prison early by arranging a cooperation agreement with federal prosecutors where the prisoner would agree to inform on criminal activity in exchange for early release. One prisoner's family gave James \$15,000 in cash, another gave him \$10,000. James gave some of the money to Elbarki's family and kept the rest for himself and his brother. George Gallego is himself the beneficiary of such a "cooperation agreement" and had his sentence reduced by informing on his criminal colleagues. The federal criminal justice system must be truly overwhelmed by informants when prisoners are willing to pay thousands of dollars to become snitches.

**OH:** On May 27, 2000, Naomi Sutton, 31, was charged with two felony counts of conveying drugs into a prison. Sutton was arrested after attempting to smuggle five marijuana filled balloons into the Southeastern Correctional Institution in Lancaster. News reports did not indicate if Sutton was a prison employee or a visitor.

**OH:** On June 14, 2000, Antonio and Antione Gray were sentenced to six months in prison after pleading guilty to one count of theft in Hamilton county common pleas court. Over a two year period the brothers placed 4,989 collect calls from the Warren Correctional Institution in Lebanon. The calls were routed through the Hamilton county Department of Human Services by two employees who knew the brothers. Taxpayers paid for the \$21,000 cost of the calls. Both men are serving lengthy sentences for murder.

**OH:** On August 14, 2000, summit county (Akron) jail guards John Koehler, 34, and Karl Schmidt, 37, were fired for assaulting jail prisoner D'Jhon Mitchell on August 8. Mitchell was not seriously injured.

**OH:** The Belmont Correctional Institution in St. Clairsville opened in 1994. The prison is sinking into the ground. As a result, one 270 bed dormitory has already closed due to cracks in walls and floors sloping so badly that doors would no longer close. The prison is built on land that was strip mined for coal in the 1970's. Nancy Raeder, head of a local activist group that opposes building on reclaimed land, said: "This is landslide country. It's a common sense issue. If you've lived around it, you know you can't build on it." Ohio prison officials have hired consultants to study the problem.

**Saudi Arabia:** On August 14, 2000, Abdel Moati Mohammed, 37, had his left eye surgically removed in his country's first eye for an eye punishment in 40 years. Mohammed was convicted of throwing acid in the face of Shihata Ajami Mahmoud in an argument over money in 1996. Mahmoud has undergone over 30 reconstructive surgeries and remains disfigured. In addition to the removal of his eye, Mohammed was fined \$68,800 and ordered to serve an undisclosed prison term. Mahmoud turned down an offer by Mohammed to pay him \$213,000 in exchange for foregoing the surgical punishment.

**SC:** On August 25, 2000, Richland county jail guard Kenneth Goins, 38, was arrested and charged with assaulting jail prisoner Richard Middleton. Police claim Goins hit Middleton on the forehead with handcuffs, threw him to the ground and jumped on top of him. Goins was placed in the jail's segregation unit after his arrest.

**TX:** On July 17, 2000, Terrell Unit (Livingston) prisoner James Wilson was found strangled to death with a shoestring.

**TX:** In August, 2000, Coryell county prosecutors filed charges against county jail prisoners Wyse McMullen, Nicholas Mejias and Anthony Thompson. The men were

charged with stealing weapons and ammunition from the jail's "secure storage" facility and planning to escape from the jail.

**VA:** On August 1, 2000, a Wise county circuit court jury acquitted former Red Onion State Prison guard Scott Yates, 21, of assault. Yates had been charged with beating shackled prisoner Timothy Grimes on October 16, 1999, at the prison. The beating was videotaped and the video was shown to the jury. Yates claimed he beat Grimes to "regain control of a dangerous situation." The Virginia DOC fired Grimes after the incident.

**WA:** Effective June 30, 2000, Cowlitz county superior court judge Randolph Furman resigned as part of a deal with the state judicial conduct commission. Furman was found to be using court computers to surf sexually explicit websites on the internet as well as online auction, personal finance, shopping and travel sites, all in violation of state law and judicial canons.

**WA:** The Airway Heights Corrections Center near Spokane suffers from a roof design flaw that causes prison buildings to leak. The Department of Corrections claims to have fixed most of the leaks by modifying overhangs at the prison. The state is now suing Phoenix, Arizona based Kitchell Contractors, the company that built the prison in 1993—1994. Kitchell is suing Spokane companies Lydig Construction, Graco Construction and Spilker Masonry for their substandard work. Lydig Construction is also suing three manufacturers who supplied building materials for the prison: Layrite Products Co., Johnson Masonry and W.R. Grace. The leaking roofs come in addition to having had to replace the prison's water cooling and heating system a few years due to faulty design problems.

**WA:** An unidentified jail guard at the King County Regional Justice Center in Kent was suspended for a month without pay after placing itching powder in the bed of four jail prisoners as a prank. Two other jail guards involved in the incident have resigned. One of the prisoner victims, Steven Ostrander, 27, said one of the guards who resigned brought the itching powder to the jail after a verbal confrontation with him. ■

## Discipline for Correspondence Containing Legal Advice Vacated; US S. Ct. Grants Review

The Ninth Circuit Court of Appeals held that punishment imposed upon a prisoner law clerk for sending a letter containing legal advice to another prisoner was an exaggerated response, which violated the law clerk's First Amendment rights.

While confined in the Montana State Prison, Kevin Murphy has worked as a law clerk. In early 1995, he learned that fellow prisoner Pat Tracy had been charged with assaulting a guard and requested his assistance.

Because Tracy had been transferred to the prison's maximum security wing, Murphy could not visit him directly and was limited to communicating with him in writing. On February 16, 1995, Murphy sent Tracy a letter containing legal advice related to the assault charge. But the letter was intercepted and read by prison officials.

Having never seen the letter, Tracy ultimately pleaded guilty to the assault charge without being made aware of the information in Murphy's letter. Murphy was subsequently punished for the content of the letter.

Murphy filed a class action suit on behalf of all of the prison's law clerks, alleging that his discipline: (1) violated the First Amendment; (2) abridged the right of prisoners to access to the courts; and (3) relied on prison regulations that are void for vagueness on their face and as applied to legal advice rendered by law clerks. The parties filed cross-motions for summary judgment and the district court granted the defendants' motion and denied Murphy's motion.

The Court of Appeals first addressed Murphy's First Amendment claim, observing that it has previously held in *Rizzo v. Dawson*, 778 F.2d 527, 531 (9th Cir. 1985), that prisoners have a First Amendment right to assist other prisoners with their legal claims.

Applying the Reasonable Relationship test of *Turner v. Safley*, 482 in light of the weak nexus between the government's interest and the category of law clerk correspondence, as well as the availability of ready alternatives. Accordingly, the court reversed the district court's grant of summary judgment for defendants on Murphy's First

Amendment claim and concluded that summary judgment should be entered in Murphy's favor on that claim.

Based upon the court's resolution of Murphy's First Amendment claim, the only remaining claim the court reached was that the regulations under which he was disciplined were facially void for vagueness. The court rejected this claim, finding that while clearer language could be imagined the challenged regulations are the sort that every prison enforces to maintain order and Murphy did not produce any authority to support his facial challenge. See: *Murphy v. Shaw*, 195 F.3d 1121 (9th Cir. 1999). On September 26, 2000, the US S. Ct. granted review to answer the question: "Does the First Amendment grant a prison inmate an independent and free standing right to assist another state prison inmate with a pending court case even if state supplies other forms of legal assistance to prison inmates. See: *Shaw v. Murphy*, S Ct. No. 99-1613. ■

## \$78,000 Damages and Fees Awarded in KS Kosher Diet Suit

A federal district court in Kansas awarded a prisoner \$30,622 in attorneys' fees and \$1,200 in costs and expenses. The court held, however, that the Prison Litigation Reform Act (PLRA), required the court to apply 25 percent of plaintiff's damages award to the fees.

Jimmy Searles, a Jewish prisoner sued prison officials, claiming that the denial of a Kosher diet violated his right to the free exercise of religion. Defendants moved for summary judgment, claiming that Searles' religious beliefs were not sincere and that they were entitled to qualified immunity from money damages. The court denied the motion and scheduled a trial. [See: *PLN*, November 1998].

A jury found for Searles and awarded him actual damages of \$3,650 and punitive damages of \$42,500. Plaintiff then filed a motion for attorneys' fees, seeking fees of \$31,629.98 and costs and expenses of \$2,177.

At the outset, the court observed that Searles' fee request was governed by the attorneys' fee provisions of the PLRA which limits fee awards to an hourly rate of not more than 150 percent of the hourly rate established under 18 U.S.C. §3006A, for payment of court-appointed counsel. The court also noted that under §3006A, the Judicial Conference of the Tenth Circuit Court of Appeals has limited attorneys' fees to \$65 per hour for in-court time and \$45 per hour for out-of-court time. Most jurisdictions are capping PLRA fees at \$112 per hour.

The court rejected defendants' argument that plaintiff should receive the \$65/\$45 rate, awarding plaintiff the maximum 150 percent maximum of \$97.50 for in-court time and \$67.50 for out-of-court time. The clerk also awarded \$30 per hour for a legal assistant and \$45 per hour for a law clerk. Accordingly,

the court awarded attorneys' fees totaling \$30,621.83.

The court also awarded costs and expenses in the amount of \$1,211 for long distance telephone calls and faxes, fax expenses, online research charges, postage costs, and travel, lodging and meal expenses.

The court held, however, that the PLRA requires a court to automatically apply a prisoner's fee award against his damages to the extent that it does not exceed 25 percent of the damages. The court found that 25 percent of Searles' \$46,150 damages award was \$11,537.50. Because his award of attorneys' fees and costs exceeded that amount, the court reduced his damages by \$11,537.50 to \$34,612.50. See: *Searles v. Von Bebbler*, 64 F.Supp.2d 1033 (D.Kan.1999). ■

# From the Editor

By Paul Wright

*PLN* recently gained the ability to process credit card orders for books, subscriptions, and donations. *PLN*'s office phone number is on page two of every issue for those who wish to subscribe, renew their subscriptions, purchase books or just make a donation using their credit card. *PLN* accepts Visa and Master Charge.

For the past nine months or so *PLN* has been distributing the great book *Lockdown America* by Christian Parenti in hard cover for \$25. *Lockdown America* has just been released in paperback and *PLN* is distributing it for \$15 per copy. We no longer have copied of the copies of the hardcover book. If you haven't yet read *Lockdown America* it is well worth reading for its excellent political analysis and in-depth factual background on the modern American police and prison state. Look for ordering information in *PLN*'s book ad in this issue.

In mid September *PLN* settled its censorship suit with the Nevada Division of Prisons (DOP). For almost a year *PLN* itself and all mail from *PLN* was totally banned in all Nevada prisons under the guise that it was "inmate mail." Under the terms of the settlement *PLN* is once again allowed entry into Nevada prisons. *PLN* was paid \$5,000 in damages to compensate it for the losses it suffered as well as to undo the censorship its Nevada subscribers suffered. This includes replacing the issues missed by our Nevada subscribers and extending their subscriptions for one year and reimbursing *PLN* for the staff time consumed in documenting the censorship. The DOP is balking at paying *PLN*'s attorney fees and costs, which are already more than \$40,000. The attorney fees and costs will be litigated in court. Once there is a final ruling on the fees we will report the settlement in its entirety.

*PLN*'s matching grant fundraiser is still in progress. To qualify for the full \$15,000 *PLN* must receive that much money from supporters before January 15, 2001. This reader support is vital for *PLN*'s ongoing operation and survival. We would like to thank everyone who has donated already. If you have not yet donated please do so, every little bit helps.

The cover story of this month's *PLN* is on health care, or the lack thereof, in Nebraska. The next few issues of *PLN* will have feature stories on abysmal health care in prison. Like everything else, prisons are a microcosm of

capitalist society at large. Just as poor and working people on the outside have problems with health care, so too do prisoners. While free people have HMOs to contend with, prisoners have privatized medical service companies: the HMOs from hell.

The death penalty gets a lot of attention, as it should, but more prisoners are murdered through medical neglect in American prisons each year than by executioners. Unlike condemned prisoners, those murdered through medical neglect don't get the benefit of judicial review. Instead, judge, jury, prosecutor and executioner are rolled into one. Usually a medical provider with a limited or suspended license with an extensive history of patient and medical abuse who is not employable in the free-world economy. Incompetence compounded with a little maliciousness and some neglect make for a deadly combination of death and needless suffering. In many cases the prisoners affected are serving short sentences or have not even been convicted.

The absence of adequate medical care is an issue that affects all prisoners, since any of us can get sick at anytime. All too often prisoners are dying of simple, treatable illnesses that escalated. For non prisoners, prisons and jails are breeding grounds for disease that ultimately spreads into the community. As previously reported in *PLN*, the epicenter of a drug resistant strain of tuberculosis in the late 1980's was the Houston jail. Prisoners with AIDS who receive improper medication develop drug resistant strains that spread into the community. The epidemic of hepatitis C festering and growing in American prisons and jails ultimately spreads into the poor communities that most prisoners come from. This silent epidemic of misery and death is almost completely ignored by the corporate media. When it is covered it is portrayed as an isolated, local incident. Upcoming issues will focus on privatized prison health care companies as well. As shown by this month's cover story, we are comparing rotten oranges to rotten apples, the only difference is that when a private company denies prisoners adequate medical care, someone is making a profit by doing so.

Enjoy this issue of *PLN* and encourage others to subscribe. ■

Holobird

# Washington Radiation Suit Settled for \$2.4 Million

by Hans Sherrer

On March 14, 2000, a class-action lawsuit by Washington State prisoners who participated in radiation experiments from 1963 to 1971 was settled for \$2.4 million.

Sixty-four prisoners at the Washington State Penitentiary at Walla Walla were involved in radiation experiments conducted on their testicles. The men were recruited by Dr. C. Alvin Paulsen, who was associated with the University of Washington, and the experiments were funded by the Atomic Energy Commission. Now known as the Department of Energy, AEC officials wanted to know the effects of radiation on the development of sperm, and multiple biopsies were performed on the participating prisoners testicular tissue.

Robert Rhay, then Superintendent of the Washington State Penitentiary, and Dr. William Conte, then Director of the Washington Department of Institutions, both encouraged prisoners to participate in Dr. Paulsen's program. The prisoners received nominal payment at the time and they were required to undergo a vasectomy at the conclusion of the experiments.

In 1993 Secretary of Energy Hazel O'Leary encouraged the release of previously secret documents related to radiation experiments on human beings during the Cold War that were financed by the federal government. Among the information released were details of radiation experiments conducted on prisoners in Oregon and Washington. Although the prisoners involved were told their radiation exposure would be similar to a regular chest x-ray, some of them were actually exposed to radiation thousands of times greater than a typical chest x-ray.

After learning the details of the radiation experiments performed on them, several of the former prisoners filed a lawsuit in federal court in December 1996: *Robert E. White, et al., v. Dr. C. Alvin Paulsen, et al.*, No. CS-97-0239 RHW (E.D. Wash.); and *Don Byers, et al. v. Dr. C. Alvin Paulsen* (E.D. Wash.). The lawsuit was filed in the U.S. District Court in Spokane, Washington, and it alleged the former prisoner's federal constitutional rights and Washington common law rights had been violated by the defen-

dants. Among other claims, the plaintiff's alleged they hadn't given fully informed consent to take part in the experiments. The defendants Dr. Paulsen, the University of Washington, the State of Washington, Mr. Rhay and Mr. Conte were alleged to have violated 42 U.S.C. §1983. The federal government was named as a defendant under the Federal Tort Claims Act, 28 U.S.C. §1346 et seq.

Of the 64 prisoners experimented on by Dr. Paulsen, 40 have died. Of the 24 survivors, 16 have come forward to prosecute their legal claims, although one is so sick he couldn't be deposed.

On January 20, 1999, the state defendant's in the suit were denied summary judgment, but the federal government's motion to dismiss the claims against it for lack of subject matter jurisdiction was granted. See: *White v. Paulsen*, 997 F. Supp 1380, EDWA 1998, [PLN March 99]. In response to the defendants appeal of portions of the District Court's ruling, the Ninth Circuit Court of Appeals directed the parties in the suit to participate in a settlement conference. The parties agreed to engage in private mediation and to stay the appeal while it was conducted.

On December 17, 1999, the District Court granted preliminary approval of a proposed settlement of the case that would pay the plaintiff's \$2.4 million as a full settlement of all claims by the plaintiff's arising from the Paulsen Experiments. A provision of the settlement agreement was the defendants' denial of any claim or allegation made by the plaintiffs.

Lawyers for the plaintiffs estimated the settlement amount was what they could reasonably expect to be awarded if the case went to trial. The federal government was the chief wrongdoer and faced the most financial liability, but the District Court had dismissed it as a defendant on technical grounds so the ability of the plaintiffs to recover damages for their injuries was significantly reduced.

If the \$2.4 million is divided among the 16 currently involved in the suit, they will receive \$150,000 each, minus attorney fees, costs and incentive awards. If

all 24 living survivors make a claim, they will receive \$100,000 each, minus deductions. Which are expected to consume half the award each plaintiff actually gets.

Considering that some of the former prisoners have suffered various maladies for more than 30 years, including swollen testicles, they are receiving minimal compensation. However, judgments around the country have shown that juries have a generally unsympathetic view of convicted criminals suing for compensation, even when they were the victims of heinous medical and scientific experiments. *White v. Paulsen*, USDC EDWA Case No. CS-97-0239 RHW

For a detailed history of this and other forms of medical experimentation on american prisoners, read *Acres of Skin*, sold by PLN on page 34. See: *White v. Paulsen*, USDC EDWA Case No. CS-97-0239 RHW ■

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## Irradiation Limitation Remains Unsettled

by James Quigley

The U.S. court of appeals for the Ninth Circuit held that factual issues, as to when a former prisoner was, or should have been, aware of his injuries from radiation experiments, precluded summary judgment on statute of limitation grounds. The Court further held that some of the defendants were, nevertheless, entitled to qualified immunity. The judgment of the district court was reversed in part.

This case involves x-ray radiation experiments conducted on unsuspecting state prisoners during the 1960's, under the auspices of the Atomic Energy Commission (AEC). For a more detailed discussion of such experiments, see *Cheaper Than Lab Rats* in the March 1999 issue of *Prison Legal News*.

This is a class action in which Harold Bibeau and his wife are the representative plaintiffs. In the 1960's, Bibeau was a prisoner confined to the Oregon State Penitentiary. During that time he was a paid volunteer in experiments involving testicular irradiation. The tests were sponsored by the AEC, and conducted by Dr. Carl Heller of the Pacific Northwest Research Foundation.

After signing a consent form, Bibeau submitted to a testicle biopsy, followed by testicular exposure to 18.5 rads of x-ray radiation, and several more follow-up biopsies to gauge the effects of the radiation. Finally, prior to his discharge from prison, Bibeau was given a vasectomy "to prevent contamination of the gene pool by mutated chromosomes."

Following his release from prison, Bibeau got married and led an uneventful life, settling near Portland. Some time in 1993, however, he came across a news report detailing an apology by then Energy Secretary Hazel O'Leary on behalf of the U.S. government for its use of human subjects in radiation experiments. Just short of two years later, Bibeau and his wife brought this action on their own behalf, and as representatives of a class of similarly situated persons.

The lawsuit claims the defendants conspired, in violation of federal law, to fraudulently induce prisoners to volun-

teer for the experiments. It also asserts state law claims for fraud, battery, breach of fiduciary duty, strict liability for ultra hazardous activity, and intentional infliction of emotional distress. The defendants countered that the claims were stale, and the district court agreed. *Bibeau v. Pacific Northwest Research Foundation*, 980 F.Supp. 349 (D.Or. 1997). Summary judgment was entered in favor of the defendants, and the case was dismissed with prejudice.

On appeal, the parties agreed that the applicable statute of limitations was two years. The question, according to the court, remains: "Two years from when?"

As a threshold matter, the court recognized the inequity of barring individuals, who have no idea they've been injured, from seeking redress simply because the statute of limitations has expired. This type of situation led to a judicial doctrine, known as the "discovery rule," which tends to offset the inequity by tolling any statutes of limitation until an individual knows, or should have known, he was injured. The rule exists under both federal and Oregon law.

The court also noted what it characterized as a "twist" to the discovery rule, which requires individuals to "be diligent in discovering the critical facts." This diligence requirement was particularly significant in this case because the events giving rise to the litigation occurred more than thirty years ago.

The problem with applying the discovery rule is that it involves a "fact-intensive" inquiry that conflicts squarely with a fundamental requirement for summary judgment, i.e., an absence of factual dispute. After thoroughly analyzing Bibeau's situation under this standard, the court determined that the "district court's ruling presupposes" too much. Since Bibeau's "state of awareness is a contested question of fact that cannot be resolved on summary judgment," the judgment was reversed.

Even though the district court decided the case solely on statute of limitations grounds, the parties had fully briefed the issue of qualified immunity in

both the trial court and on appeal. In the interest of "judicial economy," the appeals court elected to address the matter.

In general, an entitlement to qualified immunity turns on whether an individual's legal rights were clearly established at the time of the relevant events. The issue is one of notice. If an official has adequate notice that his actions are improper, then qualified immunity must be denied.

In this case, the court relied on Ninth Circuit precedent in deciding that the Pacific Northwest Research Foundation, a corporation acting as a government contractor, and Dr. Mavis Rowley, who was Dr. Heller's assistant, were not entitled to qualified immunity; however, the rest of the defendants were. The case was remanded for further proceedings. See: *Bibeau v. Pacific Northwest Research Foundation*, 188 F.3d 1105 (9th Cir. 1999).

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## Dismissal of Medical Claim Reversed After Prisoner's Death

The Court of Appeals for the Tenth Circuit held that a district court erred when it dismissed a lawsuit, filed by the estate of a Wyoming prisoner, that claimed prison officials showed a deliberate indifference to his medical needs relating to diabetes and hypertension.

In 1996, Wy. prisoner Jody Mapp suffered from diabetes and hypertension. He was denied insulin in June by one prison doctor despite a prescription by another prison doctor. This denial lasted over a year and ended only after Mapp suffered a heart attack in 1997. Mapp then filed a §1983 complaint. Though he had three or more previous complaints dismissed as frivolous or for failing to state a claim, in December of 1997 the magistrate judge granted in forma pauperis status based on Mapp alleging imminent danger of serious physical injury.

After numerous pleadings were filed, Mapp moved in March of 1998 for a court ordered physical examination. He claimed his life was in danger and he was afraid of losing his sight, suffering limb amputations, and heart problems. A month later Mapp underwent quadruple bypass surgery. That August, after determining Mapp's allegations amounted to just a disagreement with his medical treatment, the District Court dismissed the suit for failure to state a claim and failing to pay the filing fee. Though Mapp attempted to amend the judgment and underlying complaint, the District Court was unmoved. Mapp died in the prison infirmary of "acute blockage of the coronary artery bypass graft" on October 31, 1998.

After briefly defining deliberate indifference, the Court held that it couldn't "conclude that Mr. Mapp failed to allege sufficient facts to state an Eighth Amendment claim." Without any response from the defendants, the case was reversed. See: *Hunt v. Uphoff*, 199 F.3d 1220 (10th Cir. 1999).

### \$35,000 Awarded to CA Prisoner in Beating Suit

On October 14, 1999, U.S. district court judge Susan Illston ruled that three Pelican Bay state prison guards

had violated the Eighth amendment rights of prisoner Ricky Gray. Gray had filed suit under 42 U.S.C. § 1983 claiming that while being unhandcuffed one of the guards pulled on the loose handcuff to cause pain, and when he protested, pulled Gray out of his cell and beat him. The case went to trial before judge Illston on July 19, 1999.

In her unpublished ruling for Gray, judge Illston held that the defendants "deliberately provoked Mr. Gray, through, pulling on the loosened handcuff, in order to justify opening his cell and subduing him with painful force." The court held that the defendants' description of events was "...implausible. The physical descriptions were inconsistent and, when demonstrated in court with the actual holding cage,... physically unlikely."

The court awarded Gray \$25,000 in compensatory damages and \$5,000 in damages against two of the guards. The award totaled \$35,000. The defendants later settled the case and dismissed their appeal. The settlement includes the \$35,000 in damages for Gray and \$80,000 in attorney fees and cost, for a total fee and damage award of \$115,000." Gray was represented by appointed counsel from the firm of Morrison and Foerster. See: *Gray v. Deneau*, USDC, ND CA. Case Number C92-3621-SI ■

### Failure to Treat Appendicitis Precludes Summary Judgment

The court of appeals for the Seventh Circuit held that a pretrial detainee's allegation of failing to treat a serious medical need precluded summary judgment in the defendant's favor. Toby R. Chavez filed a civil rights suit alleging that while he was a prisoner at the Hendry County Jail, officials there were deliberately indifferent to the perforated appendix he suffered.

The appeals court found that from October 21, 1996 to October 31, 1996, Chavez had continuously complained of severe stomach pain, inability to have a bowel movement, was vomiting, had chills, and requested to go to the hospital. Chavez was told he had to see the nurse practitioner first.

On October 23rd, Chavez saw nurse Battles who, diagnosed his condition as

the flu and, ordered a diet of soup and cracker as well as Ex-Lax. Battles further ordered that Chavez see a doctor if his condition worsened. On October 30th, Chavez again saw Battles and informed her his symptoms had continued unabated. Battles ordered he take more liquids and a stronger laxative Dulcolax one time, as well as again ordering Chavez be taken to a doctor if his symptoms continued. Finally, Chavez was taken to an emergency room at 9:30 p.m. on October 30, where he was diagnosed with the perforated appendix.

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### deliberately indifferent to the perforated appendix he suffered...

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On appeal, Battles asserted her conduct "complied with the applicable standard of care for a medical professional." The appeals court noted that a defense witness, Dr. Thomas G. Soper, testified that although Chavez's symptoms were like those of the stomach flu, they were also consistent with, among other ailments, appendicitis. The court stated that Battles did virtually the same thing on the 30th as she did on the 23rd, even though Chavez suffered for 7 extra days. She also knew that her order of the 23rd to take Chavez to a doctor was not heeded, so how could she assume her order of the 30th would be heeded. The court held that Chavez had presented enough evidence to infer the nurses treatment was a substantial departure from accepted professional judgment.

As to the jail guards, Chavez had presented evidence which would allow an inference they were deliberately indifferent to his condition. The court noted that Chavez complained to the guard of his pain and duress. The medical diagnosis exhibited Chavez's appendix had been ruptured for some time and no action was taken by the guards to treat his suffering. The most glaring example was when guard Shoemaker could not find the prescribed Dulcolax, and substituted mineral oil. This case requires a determination of what the officers knew to establish if they were deliberately indifferent.

The case was remanded to the district court for further proceedings. See: *Chavez v. Cady*, 207 F.3d 901 (7th Cir. 2000). ■

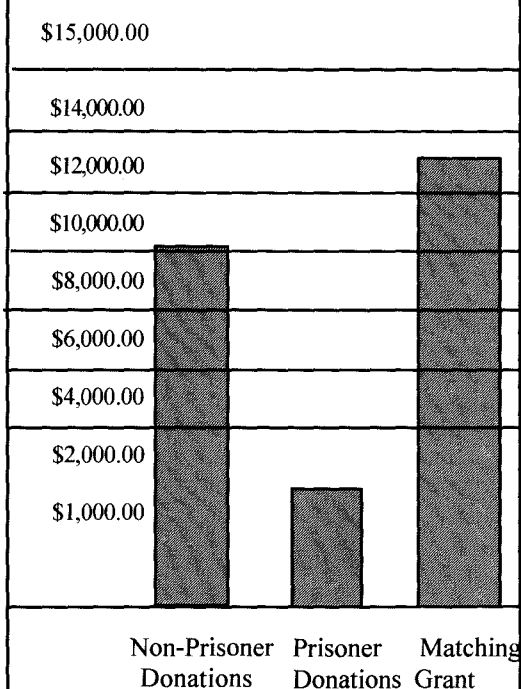
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## MICH Hearing Officer's Stews Over Firing

The Sixth Circuit Court of Appeals held that fact issues existed as to whether a major misconduct decision maker employed by the Michigan Department of Corrections (MDOC) was retaliated against and fired, for failing to maintain a 90% misconduct conviction rate and for filing a grievance based on race factors.

Everett Perry, a black man and licensed attorney, was hired by the MDOC in 1988 as decision maker for major misconduct disciplinary hearings. Perry was fired five years later. Thereafter, Perry filed a lawsuit alleging prison officials violated his rights under, inter alia, the First and Fourteenth Amendments and Michigan's Elliott-Larsen Civil Rights Act (ELCRA).

The facts disclosed that the deputy director for the MDOC decided in the 1980's that not guilty/dismissal rates

greater than 10% were to be viewed as a trouble signal. Perry's not guilty/dismissal rate hovered between 17% and 18%. Perry's performance was addressed through departmental citations. Specifically, on nineteen occasions in sixteen months Perry was cited for conduct, namely typographical errors, failing to correct an incorrect prisoner number written by a prison guard, for re-listing a case to get physical evidence and on one occasion for replacing the word "or" with a colon. Based on the repeated citations Perry was considered unqualified and fired.

Perry claimed that hearing officer decisions are speech interests protected by the First Amendment. By extension, a rule which requires a guilty rate of 90% impermissibly infringed on his First Amendment Right to free expression. Perry also claimed that the citations he received were pretextual, with the true intent being to encourage him to reduce his not-guilty/dismissal rate. On this issue the facts disclosed that Perry's non-minority co-workers were guilty of

## MI Qouta (cont)

the same or similar conduct and in some instances their conduct dwarfed Perry's by comparison yet not one of them received citations. The facts further disclosed that Perry's non-minority co-workers maintained a 90% or better guilty rate. Based on these facts, Perry claimed in a departmental grievance that he was being discriminated against based on his race.

Perry alleged that by disciplining him and then firing him for failing to maintain a 90% conviction rate constituted retaliation in violation of his First and Fourteenth Amendments. Perry also alleged that by firing him for filing a grievance over race-based issues constituted retaliation in contravention of the First and Fourteenth Amendments and the ELCRA.

The defendant denied that Perry was fired for any reason other than his poor rating as reflected by the number of citations he received. The defendant further argued that Perry's complaint of disparate treatment was a private communication between Perry and his supervisor and otherwise not protected speech. The Head of the Hearings Division denied that anyone under her supervision were ever formally limited to particular not guilty/dismissal rate, but admitted that when a not guilty/dismissal rate exceeded 10%, pressure was put on wardens to bring that rate down. The defendant could not, however, explain away the inconsistent treatment between Perry and his non-minority co-workers.

The Sixth Circuit held that decisions of a hearings officer were communicative speech, expression, within the meaning of the First Amendment; that a rule which required a guilty rate of 90% impermissibly infringed on that right; that government cannot condition public employment on a basis that infringes the employee's protected interest in freedom of expression; and that disciplining and terminating an employee for exercising his right of expression constitutes a First Amendment violation. The Court further held that racial discrimination is inherently a matter of public concern within the meaning of the First Amendment and that an employee's choice to communicate privately with an employer does not strip the concern of its public nature. Finally, the Court held a fundamental right

can served as the basis for a Fourteenth Amendment substantive due process violation. In that regard, the determinative issue is whether the conduct shocks the conscience.

Of notable interest, the court stated that under circumstances where decision makers must focus on finding 90% of the defendants before them guilty, they cannot possibly be impartial as required by *Wolff v. McDonnell*, 418 US 539 (1974). The prisoner whose case merits a non-guilty finding, but whose case would result in the eleventh not-guilty finding in one hundred decisions, is sunk. His fate is sealed before his file is opened. Such a system reeks of arbitrary justice, which can only be injustice" See: *Perry v. McGinnis*, 209 F.3d 597 (6th Cir. 2000). (Note: *Heit et al v. Van Ochten et al*, USDC #1:96-CV-800, a certified class action filed on behalf of all Michigan Prisoners charged that the hearing process in Michigan was constitutionally contaminated by the 90% conviction rate. The defendants claimed there was no such 90% rule until the day following the release of *Perry*. *Heit* is now under consideration for a proposed settlement. Under the terms of the proposed settlement, the MDOC simply has to promise not to keep statistical data of conviction rates and prison employees may no longer contact the hearings division and complain of decisions reached contrary to how they felt the decision should have gone. (The settlement will not strip prisoners of a right to file their own action for damages). ■

## Private Citizen Liable For Jail Slavery Under §1983

A federal district court in Georgia held that a private citizen who exercises authority over a county prisoner can be held liable under 42 U.S.C. §1983 as a state actor.

Lamar County, Georgia prisoner, James Marshall Mauldin, Jr., filed suit against James Burnette, a private citizen; Frank Monaghan, Sheriff, Lamar County; Katherine Martin, Probate Judge; and Lamar County, Georgia, alleging he was removed from jail and forced to work without pay.

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Sheriff Monaghan informed Mauldin he was to be released from his jail sentence on October 21, 1996. However, Mauldin was arraigned that day on an unrelated misdemeanor charge and was not released. Monaghan, upon learning this, arranged for Mauldin to appear before Judge Martin.

Upon arrival in chambers, Burnette, who is Martin's brother, informed Mauldin that he had been ordered to work with Burnette as part of his rehabilitation. When Mauldin protested to Judge Martin, she replied, "I'm the Probate Judge of this county."

From November 11, 1996 through December 16, 1996, Burnette signed Mauldin out of jail on Mondays, returning him on Fridays. Mauldin was forced to work with employees of Burnette's Construction Company, cutting grass, weeds, and bushes, raking and painting. Burnette forced Mauldin to sleep next to him on a cot, and told Mauldin if he ran, he would kill him.

The court granted summary judgment to Martin, Monaghan, and Lamar County on various absolute immunity theories. In response to Burnette, the court stated the acts of a private entity may be deemed to be state acts where: (1) there is a sufficiently close nexus between

the state and the challenged action: (2) the state has so coerced or encouraged a private act that it must be considered the act of the state; and (3) the private entity exercises powers traditionally reserved exclusively to the state.

Burnette, under the facts alleged, had custodial control of Mauldin, and his treatment may have been unconstitutional. Readers should note this is not a ruling on the merits. See: *Mauldin v. Burnette*, 89 F. Supp. 2d 1371 (M.D. Ga. 2000). ■

### **\$586,000 to Settle KY Jail Strip Search Suit**

On January 25, 2000, Jefferson County, Kentucky, announced it would pay \$586,000 to 31 people strip searched after being booked into the Jefferson county jail on minor traffic offenses in 1993. Previously, PLN reported that Jefferson County had paid \$11.5 million to settle a class action lawsuit by 6-8,000 people who were wrongly strip searched at the jail.

The second suit which was settled concerns jail strip searches that occurred after a federal court had already enjoined the strip searches filed in the first suit which previously settled. The \$586,000 settlement includes attorney fees. Nick Fawkins, one of the plaintiffs' attorneys, said the 20 men

and 11 women would receive unspecified equal amounts of the settlement, even though the women would receive larger dollar amounts than the men. The lawsuit was filed by people who were strip searched at the jail after being arrested for misdemeanors and minor traffic offenses. As a result of the various lawsuits, and paying out over \$3 million in settlements and jury verdicts, the Jefferson County Jail now only strip searches felony arrestees.

■ Source: *Louisville Courier Journal*

### **\$12,000 Awarded in NY Slip and Fall**

On July 15, 1999, the New York court of claims awarded pro se New York state prisoner Hamilton Thompson 112,000 for past pain and suffering. In 1996, while imprisoned at the Oneida Correctional Facility, Thompson slipped and fell in a puddle of water in his cell.

Prior to falling in the water Thompson had noticed the cell roof was leaking when it rained and prison officials were aware of the leak but did not fix it. The court held that Thompson had established a prima facie case of negligence by prison officials, which was not rebutted at trial.

Thompson suffered a broken nose in the fall as well as minor facial cuts. The

court awarded 112,000 in damages. See: *Thompson v. State of New York*, Claim Number 94295, Court of Claims, Saratoga Springs.

■ Source: *New York Jury Verdict Reporter*

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## Retaliatory Denial of WA Parole Decision Vacated

The Washington state Supreme Court, sitting En Banc held that Washington's Indeterminate Sentencing Review Board (ISRB) improperly considered a history of filing litigation and grievances against prison officials, in finding that a prisoner was unfit for parole.

During a 1997 parole consideration hearing for Lincoln Addelman, the ISRB had before it, detailed information concerning numerous personal grievance actions and litigation that Addelman had filed against prison officials. Ultimately, the ISRB denied Addelman parole. He then filed a personal restrain petitioner in the Washington Court of Appeals, which was denied. Addelman then petitioned for review by the Supreme Court and the Court granted review "on the limited issue of whether the ISRB improperly considered Addelman's litigation and grievances activities when finding him unfit for parole."

The Court applied the three-step test announced in *Thaddeus-X v. Blatter*, 175 F.3d 378 (6th Cir. 1999 En Banc), for determining retaliation: (1) the plaintiff engaged in protected conduct; (2) an adverse action was taken; and (3) there is at least a partial causal relation between the protected conduct and the action.

The Court then found that "it is clear that prisoners have a well established constitutional right to access the courts, based in part on the First Amendment" and that the "denial of parole is clearly an adverse action." Accordingly, the court held that "if an inmate is denied parole and that denial is caused by an attempt to access the courts, a prima facie case of retaliation as been made."

The court observed that the only serious question before it was whether a partial causal connection existed between Addelman's litigation and the denial of parole. The court found that such a connection existed, noting that it was not necessary that the denial of parole was cause solely by the ISRB's response to Addelman's litigation. Instead, "a partial causal connection is all that is required." Accordingly, the Court vacated the ISRB's decision and ordered a new hear-

ing with all references to litigation and grievance activities stricken from the record.

This decision is also applicable to cases involving adverse actions taken by prison officials in retaliation for a prisoner engaging in protected conduct. Therefore, this decision would also be useful in negating any qualified immunity defense that prison officials may advance. See: *inre Addleman*, 139, WA 2d. 715, (2000) ■

## Withholding Interest Does Not Violate Takings Clause

A federal district court in California held that prison officials did not violate the Takings Clause by failing to pay interest on funds deposited by prisoners into non-interest bearing "Inmate Trust Accounts" (ITAs). The court also held that: applying interest earned on excess ITA funds to the Inmate Welfare Fund was not an unconstitutional taking; prison officials were entitled to qualified immunity; and prisoners failed to establish an equal protection violation. Accordingly, the court granted defendants' motion for summary judgment and denied the plaintiffs' motion.

Several current and former state prisoners brought a §1983 action, alleging that the California Department of Corrections, (CDC), violated the Takings Clause and equal protection clause by failing to pay constructive interest on funds deposited in ITAs.

In 1997 the district court held that plaintiffs did not possess a property interest in the interest earned on money placed in ITAs and dismissed the complaint without leave to amend. See: *Schneider v. California Department of Corrections*, 957 F.Supp. 1145 (N.D. Cal. 1997).

Plaintiffs appealed and the Court of Appeals for the Ninth Circuit reversed and remanded, holding that plaintiffs possessed a constitutionally cognizable property right in the interest earned on funds deposited into the ITAs. The court also ordered further discovery regarding accrual of actual or constructive interest on ITA funds. See: *Schneider v. California Depart-*

*ment of Corrections*, 151 F.3d 1194 (9th Cir. 1998)[PLN April 1999].

On remand, the court held that plaintiffs failed to proffer evidence sufficient to raise a triable issue of fact which could defeat summary judgment. The court found that "the uncontradicted evidence shows that plaintiffs would receive very little interest on their ITA deposits and that the costs of administering such a system, if charged back to the inmates, would more than consume the interest earned." The court noted that plaintiffs provided no evidence or analysis that would contradict "defendants' contention that the cost of operating such an interest-bearing ITA would exceed the interest owed."

The court also concluded that "in light of the uncontroverted evidence that any interest earned by plaintiffs would be swallowed by fees," the "application of the interest earned on excess ITA funds to the use of the Inmate Welfare Fund provided plaintiff with a benefit rather than an unwarranted burden."

In holding that prison officials were entitled to qualified immunity, the court noted that plaintiffs failed to cite any "cases which hold that it is unconstitutional for the state department of corrections to withhold de minimis interest accruals in lieu of charging an administrative service fee or to pool minimal interest accruals to provide funds for the collective benefit of inmates."

Finally, in denying plaintiff's claim that they are denied equal protection of the law because state parolees are offered interest-bearing ITAs but they aren't, the court noted that plaintiffs offered no evidence "either than parolees are provided with ITAs that earn interest or that ITAs are maintained for parolees at all." See: *Schneider v. California Department of Corrections*, 91 F.Supp.2d 1316 (N.D. Cal. 2000).

Following *Schneider*, a federal district court in Virginia made a similar ruling, holding that the Virginia Department of Corrections (VDOC) policy of retaining interest generated on the money prisoners earn while incarcerated does not violate the Takings Clause. See: *Chalmers v. Winston*, 95 F.Supp.2d 536 (E.D. Va. 2000). ■

## Administrative Remedies Exhaustion Tolls LA Statute of Limitations

by Ronald Young

The court of appeals for the Fifth circuit held that state administrative proceedings a prisoner was required to exhaust tolled Louisiana's one-year prescriptive period for filing a civil rights claim. The court also held that the prisoner stated a claim of cruel and unusual punishment in his claim for denial of medical treatment.

Mark Harris, a Louisiana state prisoner, sued three prison medical staff members under 42 U.S.C. § 1983, alleging deliberate indifference to his serious medical needs in violation of the Eighth Amendment. Harris exhausted the administrative procedures available within the state prison system which included an appeal in state court, and finally filed his federal suit.

Because Harris did not file his federal suit until 17 months after the events at issue, the district court concluded that his claims were barred by the one-year prescriptive period applicable to federal civil rights suits filed in Louisiana.

Federal courts borrow state statutes of limitations to govern claims brought under 42 U.S.C. § 1983. Under federal law, a Section 1983 action generally accrues when a plaintiff knows or has reason to know of the injury which is the basis of the action. See: *Jackson v. Johnson*, 950 F.2d 263 (5th Cir. 1992).

The appeals court looked at the administrative remedies exhaustion requirements of 42 U.S.C. § 1997e. It found that Sec. 1997e clearly requires a state prisoner to exhaust available administrative remedies before filing a Section 1983 suit and precludes him or her from filing suit while the administrative complaint is pending. See: *Wendell v. Asher*, 162 F.3d 887 (5th Cir. 1998). The Fifth circuit, however, has also held that a district court should not require exhaustion under Sec. 1997e if the prisoner seeks only monetary damages and the prison grievance system does not afford such a remedy. In this case, Harris sought

monetary damages from members of the prison medical staff for their alleged deliberate indifference to his serious medical needs.

What this means is that in order for Harris to toll the one-year prescriptive period during his exhaustion of administrative remedies, he would have to show that monetary damages was an available remedy under the Louisiana prison grievance system.

The Louisiana Legislature enacted La. Rev. Stat. Ann. § 15:1171-79 as an express authorization for the Louisiana Department of Public Safety and Corrections (LDPSC) to promulgate administrative complaint procedures for the prison system, including the authority for the LDPSC to award monetary damages to prisoners who prevail in their administrative complaints. Therefore, the appeals court found that Harris invoked an administrative procedure under which he could, and did, seek monetary damages as a remedy. The court further found that while Harris pursued these administrative remedies the prescriptive period was tolled and Harris had timely filed his federal civil rights claim within one year after the prescriptive period began to run.

Concerning Harris's claim for deliberate indifference to a serious medical condition, the appeals court concluded that Harris' complaint alleged facts that present a cognizable claim for relief.

Harris claimed that minutes after removal of retaining wires used to set his broken jaw 19 days earlier, his jaw shifted and fell out of place causing excruciating pain. This occurred while Harris was waiting in an outside cell at the hospital where the removal procedure was performed by oral surgeons. Harris notified the guard accompanying him of his predicament, but the guard replied that he could not take Harris back inside the clinic.

The guard, instead, tried to reach the clinic staff by telephone but was unsuccessful in doing so. Harris had to return to the Hunt Correctional Center in St. Gabriel, La., where he endured constant and extreme pain until his return to the hospital for a follow-up visit a week later, even though he made repeated attempts prior to that visit to obtain relief from two prison nurses

and the prison doctor Michael Hegmann. In fact, during this time Dr. Hegmann discharged Harris from the infirmary, and called for Harris to return to work and no longer receive a liquid diet. This exacerbated the situation causing Harris even greater agony as he struggled to eat solid food with a broken jaw.

When Harris returned to the hospital's oral surgery clinic for the follow-up appointment, an x-ray quickly verified that Harris's jaw had rebroken. Clinic staff reset and rewired the jaw the same day. The appeals court found that Harris's allegations of facts demonstrating that all three defendants were made aware of, and disregarded, a substantial risk to Harris's health when they denied him treatment, satisfied both the objective and subjective components of an Eighth Amendment claim, and therefore stated a claim upon which relief may be granted.

The dismissal by the district court of Harris's claims was reversed and remanded for further proceedings. See: *Harris v. Hegman*, 198 F.3d 153 (5th Cir. 1999). ■

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## **Circuit Upholds Ban on Sex-based publications; Requires Due Process**

**A**gainst a First Amendment challenge, the Ninth Circuit has upheld a prison regulation banning sex-based publications depicting penetration. The Court also held that prisoners have a Fourteenth Amendment due process liberty interest in receiving a notice that incoming mail is being withheld by prison authorities. The court also discussed the evidentiary burden on challenged prison rules.

Raymond Frost, a prisoner in the Arizona Department of Corrections (ADOC), subscribed to *Gallery* and *Penthouse* magazines. Between 1994 and 1996 Frost had several issues of these magazines rejected by the facility mailroom. Some rejections were without explanation while others were based on "showing penetration" or "material which, in the Warden's opinion, pose[d] a threat to the safe, secure and orderly operation of the prison," or, generally, "unauthorized property." On further review, administrators continued the rejections based on the magazines containing various forms of penetration and advertisements soliciting "sexual behavior that poses a threat to female staff." By 1996 Frost was no longer receiving any issues of *Penthouse* nor was he receiving any rejection notices.

Frost also became a member of a music club, BMG, where he accepted an offer for eight free CDs if he was willing to purchase one CD over the next year. BMG determined that Frost was a prisoner and, per their own policy, requested the ADOC return the eight CDs. The ADOC complied but never informed Frost that the CDs were rejected nor that they were returned. The District Court found the CDs were the property of BMG and rightfully returned. The Court of Appeals affirmed but in a footnote held that Frost had a due process right to notice of the ADOC's actions.

The Court of Appeals addressed several points concerning Frost's magazines. First, while the District Court failed to consider Frost's Fourteenth Amendment Due Process claim, the Court of Appeals held that Frost had a "due process liberty interest in receiving notice that his incoming mail is being held by prison authorities." The Court found this principle rested sol-

idly upon a foundation of case law, the Hook Consent Decree, and an ADOC Internal Management Policy. The Court remanded this issue so the District Court could consider whether Frost received the minimal procedural safeguards required by the Due Process Clause.

Frost had requested that the District Court hold the ADOC in contempt for violating the Hook Consent Decree, a 1973 decree governing prisoner publications. The District Court initially found that Frost's claim itself was for enforcement of the Hook Consent Decree and thus he was required to proceed through class counsel. But then the District Court decided to let Frost proceed outside of the *Hook* class action to the extent that he was seeking damages as opposed to equitable relief. The Court of Appeals remanded this issue for a determination by the District Court whether Frost has to bring his equitable claims through the *Hook* class counsel.

At this point, the District Court characterized Frost's claims as a First Amendment challenge. Addressing this challenge, the District Court granted summary judgment finding that Frost's First Amendment rights were not violated and that the defendants had qualified immunity for their actions. This forced the Court of Appeals to reconcile its en banc decision in *Mauro v. Arpaio*, 188 F.3d 1054 (9th Cir. 1999) [*PLN*, April 2000] (upholding a ban on pornography in the Maricopa County Jail by applying the "reasonableness" test of *Turner v. Safley*, 482 U.S. 78 (1987) to pre-trial detainees) with *Walker v. Sumner*, 917 F.2d 382 (9th Cir. 1990) (establishing the evidentiary burden prison officials must meet to satisfy *Turner*).

After the standards set forth in *Turner* were announced, the Ninth Circuit began interpreting these standards in *Walker*, where the Court held that prison authorities must "identify the specific penological interests involved" in a regulation and then must demonstrate both that the cited "specific interests are the actual basis for [the] policies and that the policies are reasonably related to the furtherance of the identified interests." In *Mauro*, these protections were swept aside in favor of deference to prison authority's judgement; if it's at all plausible that prison officials believe the policy would further some objective, then *Turner*'s first prong is satisfied. The Court attempts to clarify that both *Walker* and *Mauro* are valid decisions by

holding that *Walker* applies when a prisoner has presented enough evidence to refute the existence of a "common-sense connection between a legitimate objective and a prison regulation." The State must then present enough evidence to show that the connection is not so "remote as to render the policy arbitrary and irrational." But when this evidentiary burden is not met by the prisoner, then a common-sense objective is presumed and *Turner*'s first prong is satisfied.

The effect of this decision is to force prisoners to a higher evidentiary burden while lowering that of the administrators' in not only First Amendment claims but in any claim requiring the four prong analysis of *Turner*, thus extending the opportunity for abusive regulations even farther.

Finding it permissive to water-down Frost's rights and thus uphold summary judgment against the First Amendment claim, the Court declined to reach the *qualified immunity* issue. See: *Frost v. Symington*, 197 F.3d 348. 9th Cir 2000 ■

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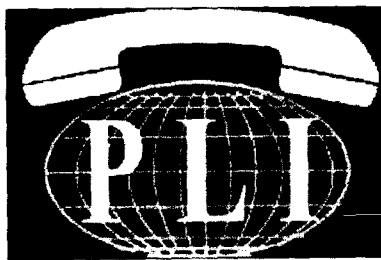
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**BACK PAGE**

# PRISON

## Legal News

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### Dying For Profits:

#### CMS and the Privatization of Prisoner Health Care

*by Ronald Young*

**M**arvin Johnson, a 28-year-old diabetic, required 100 units of insulin per day to stay alive. On the morning of July 27, 1995, he was arrested and jailed in Little Rock, Arkansas for driving an acquaintance's red Ford Escort without permission. Less than three days later, Johnson lapsed into a coma in his jail cell and died for lack of insulin.

Johnson was charged with misdemeanor unlawful use of a vehicle but ended up being sentenced to death. What was criminal in Johnson's case was the tortured death he suffered as a result of the blatant disregard to his pleas

for help by the jail's medical provider Correctional Medical Services (CMS), based in St. Louis, Missouri. Johnson died on July 29, 1995, early in the morning of his third day in the Pulaski County Jail. In his 30-hour wait for insulin, Johnson told three nurses and six sheriff's deputies that he was an insulin-dependent diabetic and needed medicine, according to an investigative report reviewed by the *St. Louis Post-Dispatch*.

Despite his pleas for help, CMS staff denied Johnson his life-sustaining shots, claiming that they could not confirm his prescription because Johnson was vague about his medical history. This was in spite of the fact that Johnson's girlfriend, LaJeanna Hawkins, had called the jail's satellite holding area to tell them Johnson was diabetic. Hawkins even offered to bring insulin to the jail, but the deputies told her Johnson would be well cared for.

The nursing supervisor reportedly accused Johnson of "faking" his condition. "He was not forthcoming about his medical history, and he exhibited behavior that he was faking," David Fuqua, a lawyer for Pulaski County, told the *Post-Dispatch*. "They get a lot of that from inmates," he said. Susan B. Adams, CMS's director of marketing and communications, claimed in a 1996 written rebuttal to a New Jersey newspaper's investigation of the incident, "We were not informed of a call to the jail by Johnson's girlfriend."

"This gentleman had his diabetes ignored, to let it go 30 hours, even after he got sick, he wasn't evaluated for hours after that," said Dr. Neil White, an associ-

ate professor at Washington University School of medicine and vice president of the St. Louis region's American Diabetes Association. "It's clearly negligence," he said. "This is not even the appropriate minimum level of care. If they had started monitoring when he first came in ... he'd probably be alive today."

Annie Johnson, who helped her late sister raise Johnson and his three siblings, sued the sheriff and CMS, alleging medical malpractice, negligence and wrongful death. By November 1997, Pulaski County and CMS paid Johnson's family a settlement. Pulaski County's portion was about \$20,000, Fuqua said. CMS, which demanded a confidentiality agreement, won't say how much it paid Johnson's family.

This is just one sordid chapter in a litany of abuses and deaths suffered by prisoners nationwide at the hands of CMS, the largest private health care provider to jails and prisons in the country. The *Detroit News* reported in June 2000 that CMS contracts with physicians and health care workers who serve more than 260,000 prisoners at roughly 315 prisons and jails in 27 states. It runs statewide prison health care systems in Alabama, Arkansas, Idaho, Massachusetts, Michigan, Minnesota, Missouri, New Jersey, New Mexico and Wyoming. CMS controls approximately 45 percent of the over-\$1 billion market.

In November 1994, CMS hired Gail R. Williams, MD, to direct mental health services in Alabama prisons, even though Oklahoma had revoked his license to prac-

### Inside

|                               |    |
|-------------------------------|----|
| From the Editor               | 6  |
| CA Ct. Overrules Parole Board | 8  |
| Book Reviews                  | 9  |
| Stun Gun Death in VA          | 11 |
| Sandin & Property Interest    | 13 |
| Pro Se Tips & Tricks          | 14 |
| 6th Cir. Mental Health        | 18 |
| WA 35% 9th Cir. Ruling        | 19 |
| From the Unrepententary       | 22 |
| News In Brief                 | 24 |
| Death as a Salesman           | 26 |
| IL Supermax Hungerstrike      | 28 |
| Private Physician Immunity    | 32 |

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## Health Care (continued)

tice the year before for sexually battering and harassing a nurse and other female staff members. CMS helped persuade Alabama's Medical Licensure Commission to give Williams a license restricted to practice in prisons. CMS was fully aware of William's past mistakes and discussed them with the board of examiners, CMS's Adams told the *Journal Of the American Medical Association (JAMA)*. "We are confident that we have measures in place to prevent him from repeating his past mistakes," she said.

Apparently these measures weren't enough to prevent Williams from making "new" mistakes concerning prisoner mental health services. A wrongful death suit was filed against Williams, CMS, and other CMS health care providers after the February 21, 1996 death of Alabama state prisoner Calvin Moore. Moore, 18, died in an isolation cell after serving only seven weeks of a two-year sentence in the Kilby Correctional Facility, a few miles east of Montgomery. According to *JAMA*, prison records show that, shortly after being admitted to Kilby on January 3, 1996, Moore began to display severe psychiatric symptoms. He stopped eating and, although he lost 56 pounds (over one-third of his body weight), he received no medical treatment other than one injection of the anti-psychotic agent haloperidol.

When Williams took charge for CMS of the mental health services in Alabama's prisons, he ordered the medical staff to greatly reduce the number of prisoners who receive psychotropic medications. He also discontinued the policy of sending the most severely mentally ill prisoners to Taylor Hardin, the state's secure medical facility. Instead they had to be treated within their respective prisons despite a shortage or absence of acute psychiatric beds and staff in the state's twelve prisons. Moore's isolation cell in the P-1 unit of Kilby was an austere administrative segregation cell not intended to house severely mentally ill prisoners. Critics of the Alabama prison system say the P-1 unit and others like it around the state also serve as warehouses for an overflow of mentally ill prisoners.

Moore spent the last several days of his life in the P-1 isolation cell sitting or lying in his own urine, most of the time in

a catatonic state. For more than a week, until a few hours before his death, no one even bothered to take his vital signs. An official state report said Moore died of natural causes "possibly related to an unidentifiable heart lesion." However, Robert H. Kirschner, MD, senior forensic consultant to Physicians for Human Rights, who served as an expert witness in the case, called the report a "whitewash" and said Moore's death was a homicide caused by dehydration and starvation resulting from criminal negligence.

CMS settled the Moore lawsuit without an admission of wrongdoing for an undisclosed amount on August 31, 1998. According to spokeswoman Adams, the CMS staff at Kilby provided Moore with "appropriate and compassionate care." "The settlement was for the compromise of a doubtful and disputed claim," She said. "A consideration in CMS's decision to settle this case was the anticipated high cost of trial and the healthcare provider's time and attention would be diverted from their duties."

Williams isn't the only CMS-employed physician working in Alabama's prisons with dubious credentials. Walter F. Mauney, MD, who was medical director at Kilby when Moore died, was also named in the Moore wrongful death lawsuit. According to CMS records reviewed by *JAMA*, Mauney was hired in 1995 shortly after being released from a drug addiction treatment center. It was also discovered that in 1979, a Monroe County, Tennessee grand jury charged Mauney with three counts of having oral sex with and sexually penetrating a 16-year-old "mentally defective" boy. Mauney, who was 40 at the time, pleaded guilty to one count of "crime against nature" and was sentenced to ten years in the state penitentiary, but the sentence was suspended.

Louis Tripoli, MD, CMS's chief medical officer, defended the company's hiring of Mauney. "Given Dr. Mauney's remorse, his desire to make amends, and based upon a review of his professional credentials and record available to us at the time, CMS believed that Dr. Mauney was a satisfactory candidate to provide inmate healthcare services," he told *JAMA*.

These hiring practices of CMS are part of an overall policy on the part of some states to issue medical licenses to previously revoked physicians, restricting their practice of medicine to prisoners. Sidney M. Wolfe, MD, director of Public Citizen's Health Research Group in Washington, DC, believes the public should be very concerned about such policies. "It is unethical and inhumane to say that a physician isn't trustworthy or good enough to treat people in the community, but that he or she is good enough to care for inmates of correctional facilities or mental hospitals," He told *JAMA*.

The Norfolk City Jail in New Jersey severed its contract with CMS in 1994, after the deaths of seven prisoners between 1993 and 1994, many because of medical reasons, jail officials reported. Norfolk Sheriff Robert McCabe said publicly in 1996 that his jail's health care was in a state of crisis. The U.S. Justice Department investigated CMS's Norfolk operation and concluded that the company's medical services there were "grossly deficient and violated inmate's constitutional rights."

In a written rebuttal on behalf of CMS, spokeswoman Adams stated to the Gloucester County (NJ) *Times*: "At Norfolk, CMS was unfairly blamed for the problems of the jail, which were actually symptoms of much larger and more chronic issues such as inadequate funding for jail services, an antiquated facility and extreme overcrowding." In the meantime, a suit filed by one of the deceased prisoner's families was settled out of court by CMS. In that case, Jerome J. Walton, Jr., 28, arrested on probation violations and a marijuana charge, died when a CMS medical assistant at Norfolk simply forgot to schedule him for a much-needed dialysis treatment.

In spite of Norfolk, the State of New Jersey awarded CMS a three-year, \$187.2 million contract in 1996, to provide health care services to the state's approximately 26,000 prisoners in state prisons. The body count began almost immediately. The first death occurred only three days after CMS took over in April 1996, when John Orriello, serving ten years for burglary, stopped breathing and died after a succession of oxygen tank failures. CMS blamed a defective regulator it had inherited from the state. Still, within less than a month after taking charge, four prisoners

had died due to problems with the health care delivery system provided by CMS.

CMS currently has a three-year contract with New Jersey for \$90 million-a-year employing some 1,200 doctors, nurses, technicians and health aides in the state's prison system. The contract expires in 2002.

On June 14, 1999, Hatari Wahaki, 41, a prisoner at the New Jersey State Prison, wrote a letter to the American Friends Service Committee complaining of searing temperatures in the ad-seg wing of the over-100-year-old prison and lack of medical for prisoners medical care that was suppose to be delivered by CMS. "I have been trying to get medical attention for months regarding a chronic respiratory condition whereas my lungs are rapidly deteriorating," Wahaki wrote. "I constantly have severe headaches where it feels like the flow of oxygen is being cut off from my brain causing sudden surges of pressure that be so intense it knocks me off balance. I have been experiencing these symptoms for over a year, yet the medical department steadfastly refused to treat me," he said.

Wahaki, along with prisoner Vidal Prince, 48, was found dead on July 4, 1999, in a cellblock described as a "brick oven." Authorities claimed that both men died of "natural causes" and not from the extreme heat or lack of medical care.

CMS makes much of its capacity to win accreditation for contracted facilities from the National Commission on Correctional Healthcare (NCCHC). But B. Jaye Anno, a doctorate-level expert in prison health care and a co-founder of the NCCHC, explained to the Garden State News Service that the accrediting organization focuses more on whether a facility has the "infrastructure" to deliver proper health care, not whether the facility does in practice deliver that care. "It's fair to say they look at minimum standards," Anno said.

CMS's Adams pointed out that CMS was able to obtain accreditation through the NCCHC for both the Norfolk, NJ and Pulaski County, AR jails. Yet, at least in the case of the Norfolk lockup, Adams put partial blame for prisoners' deaths on an "antiquated facility." In light of Anno's statement that NCCHC accreditation focuses mainly on a facility's infrastructure, it would appear that Adam's attempt to shift the blame from CMS to inferior fa-

cilities must be looked upon with a suspicious eye. NCCHC certification shows that the necessary minimum medical infrastructure was in place at Norfolk. If it can be shown otherwise, as Adams originally maintained, then this would prove that NCCHC certification is basically meaningless. Whichever may be the case, this bit of contradiction shows that CMS is being purposely evasive and even misleading as to what of who actually caused the deaths at Norfolk.

Lawyers for the State of New Jersey and CMS appeared in federal court on July 17, 2000 to fight efforts by New York-based Human Rights Watch (HRW) to have access to progress reports about psychiatric treatment being provided to mentally ill state prisoners. Bruce Cohen, a Chathan, NJ lawyer handling the case for HRW, told the Associated Press that the broad secrecy imposed by the state and by CMS was disturbing. "The public of New Jersey doesn't realize that the situation in New Jersey prisons for the mentally ill was horrendous," Cohen said.

The Center for Social Justice, a public-interest group based at Seton Hall University law school, filed a class-action lawsuit on behalf of mentally ill prisoners in New Jersey that was settled in a confidential agreement (CMS's favorite form of settlement) in July 1999. CMS argued that required follow-up reports on conditions are also confidential under the settlement. Jamie Fellner, a staff attorney for HRW, said she was disturbed by the secrecy attitude conveyed by the attorneys representing the private firms. "It would be a disaster for democracy, and certainly for the criminal justice system, if the fact that you privatize suddenly means the public cannot know how its responsibilities and the state's responsibilities are being met, and yet that would seem to be the argument that the subcontractors would like to make," she told the AP.

CMS spokesman Ken Fields said Fellner was incorrect. "We welcome any independent examination of the health care services we provide," he told AP. "The fact that CMS is a private company has nothing to do with the fact that those monitoring reports were confidential."

In Michigan, United Auto Workers (UAW) Local 6000 filed a suit on May 25, 2000 in federal court seeking a temporary restraining order to keep the state from

## Health Care (continued)

replacing approximately 70 prison health care workers with CMS employees. Since February 1998, Michigan has had a \$37 million-a-year contract with CMS to cover off-site hospitalization and specialty care for the state's approximately 45,000 prisoners. The latest expansion of the contract, which the UAW suit is over, includes CMS providing on-site primary care, becoming in essence the gatekeeper making the determination of which prisoners will receive off-site services. The potential for abuse by CMS in order to cut costs is obvious. These additional services will cost Michigan taxpayers an additional \$9 million a year.

Without the remedy, the UAW lawsuit says, CMS as the nation's largest supplier of medical care to prisons would expose state prisoners to "the so-called care of a company whose track record shows a profound and continuing defiance of constitutional standards of care."

The UAW suit points to a North Carolina case where CMS is facing an involuntary manslaughter charge for the 1996 death of prisoner Clarence Junior Cousins. Cousins, 37, a textile worker, was put into a special medical-watch cell at the Forsyth County Jail, where CMS provides prisoner health care services. An autopsy showed that Cousins died from alcohol withdrawal.

Prosecutors allege that Cousins' alcohol withdrawal went untreated after a CMS nurse, Arthelia Moser, who was untrained in alcohol withdrawal, misdiagnosed Cousins as having a mental disorder. Moser was indicted in October 1998 for involuntary manslaughter. Cousins had told a nurse when he was admitted into the jail that he had been drinking heavily. The indictment against Moser said that a person exercising ordinary care or reasonable caution would have seen that Cousins needed treatment and that Moser's inaction contributed to Cousins' death.

Sheila Cousins, Cousins' wife, and his children filed a civil suit in March 1997 against Moser and CMS. Both settled the lawsuit out of court in March 1998 for \$175,000.

In response to the involuntary manslaughter charge against CMS, spokesman Fields told *The Detroit News*, "The allegations are false." He said the

allegations concern staffing levels and pointed out that staffing levels at the time exceeded required levels. He also said CMS still operates at the Forsyth County Jail.

The UAW suit also cites an opinion from an Idaho judge who in May 2000, cited scandalously poor treatment in the states prison health care system (operated by CMS) and ordered the release on probation of an ailing, elderly man he sentenced November 1999 to up to six years in prison for vehicular manslaughter.

In ordering the release of the prisoner, Kenneth L. Pool, Fifth District State Judge Monte Carlson commented on the level of health care being provided by CMS, stating: "Mr. Pool deserves to be punished and he deserves to be in prison. His sentence is well within the punishment authority given to district court judges, and in my opinion is appropriate. But his treatment in the first five months of custody in the Idaho State Prison more closely resembles physical torture than incarceration. His treatment violates the standards of decency in today's society."

Judge Carlson also said that a private physician who examined Pool concluded that a doctor providing such medical care to a patient outside prison would be guilty of malpractice. Idaho DOC spokesman Mark Carnopis defended CMS. "We've contracted with Correctional Medical Services ... to provide our medical care since October 1996," he told the AP. "They've done a very good job in providing that care and we're happy with them providing that care."

In South Carolina, state officials there weren't singing praises to CMS after having contracted with the company for nearly three years to provide health care services in 10 of the state's 32 prisons. That contract was terminated in January 2000. A report released in May 2000 by the South Carolina Legislative Audit Council found \$632,698 in overpayments to CMS for providing HIV treatment to prisoners. The report also said that there was a severe lack of oversight by the state of CMS operations. In particular, it found that prison officials were lax in monitoring CMS prisons and fining CMS for violations, while CMS failed to meet standards for distributing medications to mentally ill prisoners at the Lee Correctional Institution. Prisoner counseling staff at both CMS and South Carolina Department of Corrections (SCDC) sites did

not meet the minimum qualifications for their positions.

In prisons where the SCDC provided health care services, the report found only one of 40 required medical audits was conducted during the two years ending in June 1999. Likewise, none of the 21 required dental audits were conducted during the same two-year period. The report said that absent the necessary audits, it's impossible to determine what level of service is being provided.

The South Carolina report underscores the fact that the health care services provided to prisoners by the state, even in the absence of privatization, is often far from adequate. Often times the bad health care services of the state are made even worse when private contractors take control. The addition of a profit incentive exacerbates the already abysmal medical care given to prisoners.

A 1999 survey by the University of Massachusetts and Local 285 of the Service Employees International Union (SEIU) accused CMS of "buffing up" in anticipation of state audits and failure to adequately address staff shortages, among other things. CMS runs the state-wide prison health care system in Massachusetts. The survey also indicated that some employees work without adequate medical supplies and are asked to sign off as having received training that they did not actually receive. 98 percent of the survey respondents said they work short-staffed, and 88 percent said they work without essential supplies. Only 19 percent reported that their facility had enough staff on hand to handle emergencies. The anonymous survey was distributed to 215 health care workers at five prisons in central Massachusetts.

*Corrections Digest* reported that complaints about Minnesota's \$9.4 million-a-year contract with CMS soared from 118 in 1998, the year CMS took over the state's prison health care system, to nearly 200 in 1999. The Minnesota Nurses Association, which represents nurses who work within the Minnesota prison system, has complained that there are pharmaceutical errors and delays in obtaining medications. "I get calls where [nurses] are just frantic," association official Mary Kay Haas told the AP.

"I still haven't received any medical attention whatsoever," New Jersey prisoner Hatari Wahaki said in a letter he wrote

three days before he died. The health care provider that ignored him to death was none other than CMS. "I consider what they are doing as literally playing with my life," Wahaki wrote.

The increasing privatization of prisoner health care is, indeed, playing with the lives of prisoners. And in an increasing number of instances it is resulting in prisoners dying-literally dying for profits. "We save money because we skip the ambulance and bring them right to the morgue," quipped nurse Diane Jackson to the *St. Louis Post-Dispatch*. Jackson was one of those disciplined in the death of Diane Nelson, 46, a mother of three and a prisoner at the Pinellas County Jail in Florida. Though Prison Health Services, Inc. (CMS's primary corporate competitor) provided health care services at Pinellas, Jackson summed up an attitude that is a deadly reality now at play in some of the nation's prisons and jails. ■

**"I know what a dump truck is, and I'm no dump truck! As an innocent man, I too have been to prison."**

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## **CMS Fined Nearly \$1 Million in Virginia**

*by Dan Pens*

**C**orrectional Medical Services (CMS) contracts with the Virginia Department of Corrections (VDOC) to provide medical care to some of its 30,000 prisoners. In a 13-month period starting in January 1999 the VDOC levied nearly \$1 million in fines against CMS for failing to live up to its contract, according to a Virginia state auditor's report.

From July 1998 to December 1999, the state of Virginia paid CMS \$28 million to provide medical services at six of the state's prisons. The fines were levied for violations such as poor record-keeping, failing to triage prisoners correctly (i.e. denying medical treatment to some prisoners), failing to properly assess prisoners' medical conditions and failure to provide timely referrals.

The company was fined \$162,471 during the four month period from October 1999 to January 2000 for deficiencies cited at just one "supermax" facility, Wallens Ridge State Prison. State auditor Walter J. Kucharski noted that CMS failed to provide Wallens Ridge prisoners with a dentist for three months and has never had an optometrist on duty there, resulting in more than 130 prisoners awaiting eye-care services.

In the report released in July 2000, Kucharski urged the state to increase its fines against CMS: "It may be cheaper for CMS to incur the penalty than to comply with the contract," Kucharski wrote.

He noted that the contract specifies a \$5,000 penalty for prisoners not seeing a physician within seven days of a referral. But there is no penalty for a prisoner not seeing a dentist or optometrist.

CMS has been the target of complaints and lawsuits nationwide [See accompanying article: "Dying for Profits"]. The company has had problems before in Virginia. In 1995, CMS came under fire after 8 of 20 prisoners receiving dialysis at Greensville Correctional Center in Jarratt, VA, died during an 11-month period beginning in December 1994.

Lawrence Frazier, a diabetic prisoner lapsed into a coma and died July 4, 2000 — after being shocked repeatedly by stun gun-wielding guards June 29 in the Wallens Ridge medical unit [See: "Stun Gun Death in VA Prison" on pg. 11 of this issue]. Witnesses say Frazier was upset and fought with guards because he wasn't getting his insulin.

Frazier was one of roughly 500 Connecticut prisoners exiled to Wallens Ridge to alleviate overcrowding there. In a lawsuit filed May 25 in federal court in Roanoke, VA, Frazier claimed he nearly died on the 22-hour bus trip from Connecticut in December because he wasn't given insulin. After he arrived at Wallens Ridge, Frazier claimed, he was denied insulin on at least two other occasions.

A federal judge dismissed Frazier's suit June 23 for failure to state a claim upon which relief could be granted — six days before he literally fought for his life (and lost) because he'd been denied insulin yet again.

Ken Fields, a CMS spokesman, said his company is working to improve service, but added that some of the issues raised by the audit are beyond the company's control. The problem, he said, stems from security procedures in "supermax" facilities like Wallens Ridge, where guards fail to deliver sick prisoners to the infirmary.

Michael Leininger, a VDOC spokesman, downplayed the importance of the state auditor's report. "They're not really talking about quality of health care, they're really talking about record-keeping," Leininger told the *Hartford Courant*.

State auditor Kucharski said his audit did not attempt to address the competence of CMS staff, the accuracy of its diagnosis or the adequacy of staffing at the prisons. He said his job is determine whether CMS is living up to the specific provisions spelled out in its contract with the state and determine if the state is getting its money's worth.

"The answer is we're not," Kucharski said. "Even correction [officials] acknowledge that, or they wouldn't be fining these people."

But Christina, Polce, a spokeswoman for the Connecticut DOC (which still houses more than 300 of its prisoners at Wallens Ridge and another 134 at the Greensville Correctional Center) said her department is confident that Virginia officials will address the issues raised in the state auditor's report.

"Nothing in the audit leads us to believe that the medical care is inadequate," Polce told the *Hartford Courant*. ■

Sources: *Hartford Courant*, The Associated Press, Reader Mail

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## From The Editor

by Paul Wright

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Starting with the November, 2000, SPLN expanded its size to 36 pages. Recent months have seen an increase in the number of advertisers we have. While postal regulations allow publications such as PLN to contain up to 75% ad content, PLN has used advertising to drive its news coverage, not vice versa as most publications do.

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PLN has recently added new books to our book list, titles that delve into the plight of the wrongly convicted (*Actual Innocence*) and the mentally ill in prison (*Prison Madness*), among other topics. PLN began distributing books as part of our public education mission. Many criminal justice related topics are complex and cannot be adequately explained within the page limits of a magazine. Some books are so good that they pretty much

say all that needs to be said on a given topic.

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PLN has until January 15, 2000, to meet its \$15,000 matching grant fundraiser goal. To get the full \$15,000 grant, PLN supporters must donate that amount as well. If you haven't donated yet please do so.

Best wishes for a more militant new year from everyone at PLN. ■

## Fired Parole Officer Wins Hefty Settlement

Washington state parole officer Barbara A. Nelson was fired in 1998 after the state was hit for more than \$6.4 million to pay off lawsuits alleging negligence for her failure to properly supervise parolees. Three men whose cases Nelson handled killed three people, including a high school cheerleader, a 23-year old woman and a retired Seattle Fire Department captain.

But under the terms of a settlement, the state awarded Nelson some \$200,000 in back pay and erased the 1998 firing from her personnel record. After her reinstatement, she promptly resigned.

The settlement, completed in March 2000, stemmed from her union's appeal of her firing and a civil lawsuit she brought against the Department of Corrections.

A spokesperson for the Washington Federation of State Employees said the settlement is tacit acknowledgement that "there are fundamental problems in the system that can't be corrected by singling out one person and putting the blame on them."

The DOC said it settled the case "to eliminate the costs associated with protracted

litigation." The department still maintains that Nelson bore responsibility in the cases.

Sylvia McFarland, mother of the murdered cheerleader said, "It's a sad day for everyone who lost loved ones to people Barbara Nelson was supposed to be supervising. I guess justice won't come on this planet."

Rep. Ida Ballasiotes, co chair of the House Criminal Justice and Corrections Committee, said she was stunned the DOC settled the case and paid Nelson.

"I just don't understand why you pay people off for doing a bad job," she said. "This is why the public gets really incensed over how things happen in state government. I can't blame them."

A Washington state prisoner (who wishes to remain unnamed) told PLN, "I just don't understand why the DOC goes on paying the parole board to do nothing at all. After these multi-million dollar lawsuits, the board virtually ceased granting paroles. This is why prisoners get really pissed about how things happen in state government. Can you blame them?" ■

Source: *Tacoma News Tribune*

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# Medical Claims Against CMS To Be Refiled In State Court

by Matthew T. Clarke

A federal district court in Illinois has dismissed the breach of medical care duty suit of a suicided prisoner's estate against Correctional Medical Services of Illinois (CMS), but encouraged the refileing of the suit in state court.

Ethel Hare was an Illinois prisoner at the Kane County Adult Correctional Center (the jail). When admitted to the jail, Hare was HIV positive and suffering from chronic liver disease, liver cirrhosis, and Hepatitis B and C. The sheriff had contracted with CMS to provide prisoner medical services at the jail.

Five months after being arrested, Hare complained of stomach ailments. She was seen by a jail doctor, who ordered her transferred to a hospital. She remained at the hospital for two days, suffering from abnormal coagulation, and was diagnosed with portal hypertension with ascites, jaundice, coagulopathy, HIV, and Hepatitis B and C. Upon release, the hospital physician noted that Hare should be closely monitored, continue her medications, receive a post-release follow up and have her chemistries monitored.

Hare's condition was initially stable. She saw a jail doctor who noted she was still slightly jaundiced and had been scratching her abdomen. Two days later, she began vomiting. She was unable to eat due to persistent vomiting, became dehydrated, and complained of pain, burning with urination, and nausea over the next two days. She became mentally disoriented, began vomiting a gritty brown substance, and was flushed and hot on the second day. Despite Hare's well-documented medical history and obvious medical distress, she was not seen by a doctor. That night, prisoners complained that Hare was gagging and required immediate medical attention; however, Hare was ignored for 4 1/2 hours—until a guard found her unconscious in her cell. Then she was finally transported to a hospital where she died two days later from acute liver failure.

Administrators of Hare's estate sued the sheriff, the county, Lisa Zegar, the

supervisory CMS jail nurse, and CMS, under 42 U.S.C. § 1983, alleging that the defendants breached their duty of care to Hare. The sheriff and Zegar filed motions for summary judgment.

The district court dismissed the sheriff from the case because the plaintiffs had not shown that he had any personal involvement in Hare's treatment. Plaintiffs insinuated that the sheriff had a policy of withholding medical treatment until a prisoner was critical, then releasing the prisoner to avoid costly treatment, supervision, and burial fees, but this too was unproven. The doctrine of *respondant superior* which allows a supervisor to be sued for the actions of his subordinates does not apply to federal civil rights actions, so the sheriff could not be sued for the actions or inaction of his deputies.

Plaintiffs admitted that Zegar supervised the jail nurses, but never actually treated Hare. Therefore, the claims against Zegar related to failure to treat Hare were dismissed. However, plaintiff's inartfully drafted claims against Zegar were also interpreted to be state tort law claims of failure to properly supervise and train the CMS nurses treating Hare which the court addressed under its supplemental jurisdiction.

The court held that there was a material fact issue of whether Zegar breached a duty to train and supervise CMS nurses which caused Hare's premature death. This precluded summary judgment on that issue. However, because all of the federal claims had been dismissed and only state claims remained, the court held that the state claims should be dismissed without prejudice to allow their refileing in state court. Readers should note that medical claims are very hard to litigate in federal court with its deliberate indifference standard. Readers should note that often a medical-issues suit which would fail in federal court as a federal constitutional claim could be successfully prosecuted under the lower standards in state court if brought as a medical negligence or medical malpractice claim. See: *Chuffo v. Ramsey*, 55 F.Supp.2d 860 (N.D.Ill. 1999)



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# CA Court Overrules Parole Denial

by John E. Dannenberg

The CA Court of Appeal affirmed the Los Angeles superior court's ruling that there was "no evidence" to support the Board of Prison Terms' (BPT) parole unsuitability finding for a 2<sup>nd</sup> degree murderer and ordered the BPT to convene a new suitability hearing within 30 days. The BPT was ordered to "render a new determination in strict accordance with both the letter and the spirit of the view expressed in this opinion" by the Court of Appeal, which emphasized that the superior court retained jurisdiction over the matter, including power to enforce contempt of its orders.

Sharply rebuking the BPT, the court "flatly reject[ed] the Board's contention that (a) Rosenkrantz's only remedy is the continuing charade of meaningless hearings, and (b) that the superior court lacks the power to compel the Board to follow the law." However, the court declined (on ripeness grounds) to rule on the BPT's counter-complaint that the court was without jurisdiction to "dictate the result that must be reached."

Of note to the thousands of CA lifers who are routinely denied parole is the court's determination that absent extrinsic evidence in the hearing record, a BPT commissioner's mere statement, without more, does not constitute "some evidence." In determining that there was "no reference to any evidence that might support such a finding [of unsuitability]," the court rejected the BPT's boilerplate language "callous disregard for human suffering," "needs therapy," and "execution-style murder" as applied to Rosenkrantz's case factors.

While this decision seriously challenges the BPT's known arbitrariness [see April, 2000 PLN, *California's No Parole Board*], it is not a panacea for all CA lifers. Rather, the court ordered relief only after a superior court had first found that there was no evidence to support the BPT's unsuitability finding. (See: *In re Powell*, 45 Cal.3d 894 (1988) [BPT's decision must be supported by "some evidence"].)

Rosenkrantz had been found suitable in 1996, but a reviewing panel disapproved the finding. Following two more unsuit-

ability findings, the BPT was ordered by the superior court to grant parole. While begrudgingly granting parole, they inconsistently found Rosenkrantz unsuitable. Gov. Davis then reversed the grant because it was based solely upon a court order. If the BPT now sets a new date, Davis could reverse them again. Rosenkrantz's final remedy would then be another writ of habeas corpus to the superior court, seeking a court-ordered release, which the governor has no authority to overrule. See: *In re Robert Rosenkrantz*, 80 Cal.App.4th 409 (April 27, 2000) ■

## Controversy Surrounds Letourneau Tape

A Washington DOC investigator allegedly left his job at the state women's prison in Purdy with a souvenir: a tape recording of Mary K. Letourneau talking on the phone with her attorney.

After starting a new job at the state Attorney General's office in 1998, the investigator played the tape to entertain co-workers, sources inside the AG's office told the *Seattle Times*.

Robert McGuire, who was a DOC "Intelligence and Investigations Officer" at the state reformatory before assuming the same position at the Purdy prison, denies ever having the tape. But two co-workers say they heard it, and a third says she turned down an offer to hear it.

"He was right over there, playing it loud, and they were making jokes," said Steve Schrum, an auditor who says he heard the tape twice.

On the tape, the witness say, Letourneau complained to her lawyer about a comment her estranged husband made on a TV talk show. She asked why she couldn't get visitation rights to see her children, and her lawyer told her a convicted child molester loses that option.

Joseph Gragnelli, a fellow investigator, says he reported the tape-playing incident to his boss, Curtis Edwards, in

late June 1998. However, according to Gragnelli, three months passed and Edwards did nothing about it. He then told Scott Blonien, head of the AG's criminal division, who subsequently ordered an internal investigation.

Some AG employees praised Gragnelli for reporting the incident. But Terry Tate, a former Yakima police officer, called him a "snitch" in a manner that Gragnelli says was angry and threatening. Tate concedes making the comment, but says it wasn't a threat.

McGuire refused to do a follow up interview with the investigator Blonien assigned. He called Blonien an "idiot" for sending him a "counseling memo" in December 1998. The memo said it couldn't be proved that McGuire had the tape but that McGuire acted "below the professional standards" of the AG's office when he discussed the contents of Letourneau's conversations with co-workers.

Some of those co-workers think McGuire got off too lightly, with only a minor reprimand from Attorney General Christine Gregoire. But Gregoire, whose husband works with McGuire, said the disciplinary letter was sufficient punishment because it will follow McGuire if he tries to get another job.

It is interesting to note that the *Times* only managed to stumble onto the story nearly two years after the fact while investigating the AG's office for a related story. In a huge stack of documents the *Times* obtained under the state public disclosure law, there was an oblique mention of the Letourneau incident. ■

Source: *The Seattle Times*

## WA Civil Commitment Ruling Published

In the September, 2000 issue of PLN we reported on a ruling by Judge William Dwyer of Seattle who held the Washington Special Commitment Center in contempt for failing to provide treatment and transitional release housing for civilly committed "sexually violent predators." The court's ruling was recently published at: *Turay v. Seling*, 108 F. Supp.2d 1148 (WD WA 2000). PLN will report any developments in the underlying contempt proceedings against the state of Washington in that case. ■

## Book Reviews:

### **Perpetuating Crime, Consolidating Power: The Race & Class Logic of Mass Incarceration**

**An Interview with Paul Wright  
by Janet Stanton**

Arthur Stamoulis's (Common Courage Press) audiotaped interview with Paul Wright offers the listener a concise overview of the most disturbing issue confronting our time — the mass incarceration and despicable treatment of Americans by the criminal "justice" system. Paul Wright is a leading expert, his insight stemming not only from his work as editor of *Prison Legal News* and co-editor of *The Celling of America*, collecting and culling vast amounts of first hand research, news reports and court documents on a daily basis, but also from his experience as an incarcerated person.

The interview probes all major aspects of mass incarceration and the results for prisoners — results like censorship, lack of rehabilitation efforts, proliferation of control units, dismal medical care, openly racist guards, lack of access to courts, libraries and lawyers, prisoner slave labor and the "third world labor model" it establishes, and private prisons. These are addressed in the interview and are covered in depth in *The Celling of America*, for which the interview serves as an accompaniment.

The hard-hitting and straightforward analysis of the race and class "logic" are what sets the interview apart from other investigations into prison problems and calls for much more than reform. For example, towards the end of the interview Stamoulis asks "...What do you think people on the outside should be doing to help prisoners...?" and the response from Wright is that this question is like asking "Well, what can we do to make life nicer for the prisoners in Auschwitz?" It is "asking the wrong question."

Wright argues that public opinion is molded by "bombardment about what to think by the mainstream media," and describes how "the ruling class in the U.S. has largely succeeded in ensuring that poor and working class people view other

poor and working class people as the biggest threat to their existence," (i.e., resentment of people on welfare and immigrants propagated by the media). He points out how "prisons aren't just meant to control the one person out of every-one hundred and fifty who is in here [1 out of 150 Americans is incarcerated]... (but) the other hundred and fifty who aren't in prison, and let them know that, yes, this could happen to you."

Therefore, Wright goes on, "conditions of prisoners are always worse than the worst conditions on the outside...(so) as conditions for poor people on the outside worsen, so, too, do conditions for prisoners on the inside worsen even further."

Wright also points out how effective the media are in demonizing "the criminal," even on the American "left," noting the strong support for Mumia and Peltier who assert their innocence, and lack of support for the hundreds of thousands of warehoused, abused people, denied justice daily — victims of a drug war and race war, but primarily a class war, a war which the ruling class is still winning. ■

### ***Perpetuating Crime, Consolidating Power***

The race and Class Logic of Mass Incarceration. An Interview with Paul Wright. Interview by Arthur Stamoulis, Common Courage Press, 12 pages.

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*PLN* Editor discusses racism, class struggle, brutality, AIDS, political prisoners and censorship as essential elements of the criminal justice system. Companion to *PLN*'s critically acclaimed *The Celling of America*. Send \$3.20 for shipping and handling, and use the book order form on page 34 of this issue. Enjoy.



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## **Actual Innocence - Five days to execution: and Other Dispatches From the Wrongly Convicted**

*by Barry Scheck, Peter Neufeld, and Jim Dwyer*

*Review by Roger Hummel*

Since 1963, at least 381 murder convictions across the nation have been reversed because of police or prosecutorial misconduct yet not one of the prosecutors who broke the law was ever convicted or disbarred.

Twenty-seven percent of those wrongfully convicted had subpar or incompetent legal help including a Kentucky capital case defendant whose attorney gave his business address as Kelly's Keg, a local tavern.

Sinister prison snitches who earned reduced sentences by fabricating fellow prisoners' "admissions" to unsolved crimes were a factor in 25% of the convictions which were later reversed.

Authors Scheck, Neufeld, and Dwyer expose these and other horrors in *Actual Innocence*, a catalog of true stories drawn from more than 60 men who were wrongfully imprisoned. Detailed case histories describe how a dozen innocent men were convicted by corrupt prosecutors, jailhouse snitches, junk science, mistaken identification, false testimony, bad layering, and other defects in our criminal justice system.

The authors combine compelling statistics, scholarly studies, anecdotal evidence, historical information, and legal precedent to call into question a system which mechanically sentences innocent people to prison and, all too often, condemns them to death.

Horror is the typical reaction to these factual accounts of tragic and sometimes evil miscarriages of justice. The reader cannot escape the conclusion that countless innocent people are in prison and, quite likely, some innocent people have been executed.

The horror is compounded by the fact that even after clear and convincing evidence of innocence has been offered, the system refuses to admit it made an error and will not release those who have been unjustly convicted. Everyone agrees that it is a terrible thing for an innocent person to be imprisoned. Far

worse, though, would be for a politician to take a moderate line on crime.

Authors Scheck and Neufeld met in 1977 when both were young lawyers working for the Bronx Legal Aid Society.

Neufeld had developed an expertise on scientific evidence that was matched by only a few of his colleagues. He was highly knowledgeable on blood tests and blood evidence. He and Scheck collaborated on many cases, most notably the O. J. Simpson trial in Los Angeles.

Scheck became a professor of law at the Benjamin N. Cardozo School of Law in New York City.

Unlike most private lawyers, Scheck had access to the resources of the criminal law clinic at Cardozo. He had a formidable cadre of academics, student investigators, researchers, and scientists who were not only bright but eager to help.

In 1991, Scheck and Neufeld founded the Innocence Project at Cardozo. Driven by the belief that the criminal justice system far too often convicts the innocent, the project provides pro bono assistance to prisoners who can convince Scheck and his students that they are innocent.

Jim Dwyer is a two-time Pulitzer Prize winner who currently writes for the *New York Daily News*. His journalistic skills were effectively employed to weave the mass of statistics, history, and tortuous judicial proceedings into the cohesive, readable narrative that became *Actual Innocence*.

The Innocence Project relies on relentless investigating, skilled lawyering, biological evidence, and DNA in particular to obtain the release of those who were wrongfully imprisoned. Scheck and Neufeld have used DNA evidence to free more than 60 innocent men. In each case, they analyzed myriad factors leading to the convictions. Mistaken eyewitnesses were a factor in 84% of the cases; snitches or informants in 25%; false or coerced confessions in 24%. Defense lawyers were inept in 27%; prosecutorial misconduct played a part in 42%; police misconduct in 50%.

Those who were wrongly convicted spent an average of 9 years behind bars before they were exonerated.

In their discussion of prosecutorial misconduct, the authors call "harmless error" the lie the criminal justice system tells itself. Lies, cheating, and distortions at the lower levels of the system are excused at higher ones. Even when an appellate court is sufficiently perturbed to reverse a guilty verdict, nothing happens to the people who broke their oaths and the law in pursuit of the conviction. Since 1963, at least 381 murder convictions have been reversed because of police or prosecutorial misconduct yet not one of the prosecutors who broke the law in these most serious charges was ever convicted or disbarred. Most of the time, they were not even disciplined. An unwritten code of silence discourages calling prosecutors to answer for their misconduct. A culture of protective secrecy silences criticism, encourages nondisclosure of potentially exculpatory evidence, and discourages any admission of errors, much less correcting and accounting for them.

The false god of "finality" often grants prosecutors leave to ignore facts and enshrine faulty convictions. Montgomery County (Texas) District Attorney Michael A. McDougal recently commented: "I can't afford to put the taxpayers of this county in the position of giving everybody a retrial that may come up with some kind of, uh, something that may indicate they may not be guilty when a jury has already said, 'Yes, you're guilty.'"

*Actual Innocence* concludes with a short list of recommended reforms to protect the innocent. At the top of the list, not surprisingly, is the need for state and federal statutes to allow postconviction DNA testing. Presently, only Illinois and New York have such laws.

Forensic scientists should formally agree that crime laboratories function as an independent third force within the criminal justice system, un beholden to

prosecutors or defense lawyers. Crime laboratory budgets should be independent from the police and police officials should not be able to exercise supervisory control over the staff of any crime lab.

To reduce eyewitness identification errors, the authors urge that all lineups and photo spreads are videotaped. An independent examiner who does not know the identity of the suspect should run all lineups and photo spreads.

All snitch interrogations and negotiations should be videotaped. Trial judges should presume that all snitch and informant testimony is unreliable and require the prosecutor to overcome that presumption before a jury can hear the evidence.

Each state should pass no-fault compensation statutes to provide relief to those persons who can prove they were wrongly convicted.

Fees for court-appointed lawyers must be raised to a level that will attract competent lawyers to take cases. Public defenders' salaries should be the same as prosecutors' in each jurisdiction.

*Actual Innocence* should be required reading for prosecutors, public defenders, judges, law enforcement officials, and everyone else involved with the criminal justice system. There is clear evidence showing that the system is broken: Scheck, Neufeld, and Dwyer offer sound recommendations to repair it.

This book is available from PLN. To order send \$24.95, plus \$3.20 priority postage, to: PLN, 2400 N.W. 80th St. PMB 148, Seattle, WA 98117. Phone orders with credit card accepted. ■

## Stun Gun Death in VA Prison

After being electrocuted repeatedly by a stun gun, Lawrence James Frazier was strapped to a bed where he lapsed into a coma and never recovered. During a struggle with guards, Frazier was electrocuted 3 times by an Ultron II stun device that delivers up to 50,000 volts of electricity to its target. After being strapped to a gurney in a 5-point restraint he was left in a medical cell. Some time later, staff members found

Frazier unconscious and unresponsive. He was transferred to Lonesome Pine Hospital in Big Stone Gap VA where he died five days later, on July 4th. Exactly how much time elapsed between Frazier's restraint and when he was discovered unconscious has not been revealed.

The cause of Frazier's death is as mysterious as the circumstances surrounding it. Larry Traylor, director of communications for Virginia DOC, adopts the conclusion that Frazier's death was the result of a massive heart attack resulting from the prolonged struggle combined with complications associated with a chronic medical condition. When Frazier, a 50-year-old diabetic, reportedly ignored verbal instructions to remain on a gurney, several guards physically restrained him. According to Major Scott Semple, Frazier was shouting, singing, and kicking when he "accidentally" kicked a guard in the face. An guard then shocked Frazier 3 times with 45,000 volts from the Ultron II stun device.

### Records indicate that Wallens Ridge used electronic stun devises 112 times between April 1999 and May 2000.

Frazier's death launched several investigations of the Wallens Ridge facility. He was the second prisoner to die in their custody since April 2000. David Tracy, a small time drug dealer was seen by security attempting to hang himself, but the 4-minutes it took for officers to enter his cell was not quick enough to prevent his death.

Frazier's death also sparked an FBI probe. Ruth E. Plagenhoef, assistant U.S. attorney in Roanoke, VA said, "If unusual circumstances appear to surround a death, it's not unusual for the FBI to become involved." John J. Armstrong, commissioner of Connecticut DOC says he welcomes the FBI investigation.

But Armstrong has also come under fire for the deaths of Frazier and Tracy. Both prisoners were part of a 500-prisoner transfer from Connecticut DOC to Wallens Ridge prison in Virginia due to overcrowding. Joseph Grabarz, a lawyer for the Connecticut Civil Liberties Union calls the exchange with VA "Armstrong's 30 pieces of silver...and every corpse

shipped back from Appalachia to Connecticut is the price we pay."

Virginia officials maintain that the repeated use of a stun gun on Frazier was not inappropriate and did not cause his death. They base this claim on an independent investigation by Dr. w. Andrew Reese, president of Creative Health resources. Reese is a self-proclaimed expert on stun gun technology. While VA prison officials insist that Reese based his findings on both a "medical and policy standpoint," the fact that Reese made his findings without the benefit of autopsy results has left some experts suspicious.

Dr. Robert Greifinger a former chief medical officer for New York DOC calls Reese's conclusions "ridiculous." He points out that Fraser's diabetes could have caused "seizure-like motions that appeared combative." According to Greifinger, Frazier's diabetes not only made his heart vulnerable to stress, the use of a stun device could have caused irregular heart rhythms.

Neither was Christina Polce, spokeswoman for the Connecticut DOC, convinced of Reese's conclusions. While she found no evidence of inadequate medical care, she stressed the need to wait for the facts. Even the president of Stun Tech, Dennis Kaufman, the manufacturer of the Ultron II says Reese is no authority on stun gun technology, calling Reese a mere "novice" who has "done his homework."

Records indicate that Wallens Ridge used electronic stun devises 112 times between April 1999 and May 2000. They have also been the targets of more than 70 civil rights lawsuits. In a report last year, Jamie Fellner, a lawyer for Human Rights Watch, accused another Virginia prison of using electronic stun devices for "punishment" rather than "control purposes."

Complete results from official investigations are still forthcoming. And while Richard A. Bieder, a trial attorney representing the families of both Tracy and Frazier admits that not enough information is available to conclude that the stun gun actually caused Frazier's death, he goes on to say that "it does seem to be awful coincidental, doesn't it?" ■

Sources: *The Hartford Courant, The Roanoke Times, Connecticut Post Republican American, Richmond Times Dispatch*

## Error to Dismiss Suit for Inability to Pay Filing Fee

The court of appeals for the Fifth circuit held that it was an abuse of discretion for a district court to dismiss a prisoner's suit for failure to pay the initial assessed filing fee without first determining if the prisoner had the means to pay the assessed filing fee. The court also gave detailed instructions for district courts and pro se prisoners filing lawsuits in forma pauperis in the Fifth circuit who lack the funds to pay the initial assessed filing fee.

Under the Prison Litigation Reform Act (PLRA) prisoners must pay the filing fee for all civil suits they file. If they cannot properly prepay the filing fee in full they can seek In Forma Pauperis (IFP) status under 28 U.S.C. § 1915 under which the district court assesses an initial filing fee of 20% of the average deposits to a prisoner's trust account, or the account's average balance over a six month period. The remainder of the fee is paid in monthly installments based on the prisoner's income.

Danny Hatebet, a Texas state prisoner, filed a civil rights suit and was assessed an initial partial filing fee he was unable to pay because he only had 20¢ in his trust account. The district court dismissed the suit without prejudice. The court of appeals vacated and remanded.

The appeals court noted that prisoners have no control over the processing of withdrawals from their prison trust accounts. "We hold that it is an abuse of discretion for a district court to dismiss an action for failure to comply with an initial filing fee order without making some inquiry regarding whether the prisoner has complied with the order by submitting any required consent forms within the time allowed for compliance."

The appeals court held that the lower court also erred in dismissing Hatchet's suit without prejudice because, due to the statute of limitations running on the underlying claim, the dismissal actually operated as a dismissal with prejudice. The district court should have considered a lesser sanction.

The court held that when a prisoner lacks the funds to pay the initial assessed filing fee in its entirety, the prison should send the court whatever amount is available. The court should allow the action

to proceed and monthly installments should be sent by the prison as funds become available, if they ever do. Prisoners are obligated to pay the full filing fee regardless of the outcome of the suit.

District courts are required to take reasonable steps to determine if the prisoner plaintiff has complied with the filing fee order. Inquiries and responses should be part of the record to allow appellate review and show cause order should be issued giving the prisoner plaintiff an opportunity to respond. See: *Hatchet v. Nettles*, 201 F.3d 651 (5th Cir. 2000). ■

## PLRA Physical Injury Rule Does Not Apply to Mail Claims

The court of appeals for the Seventh circuit held that pre-filing screening under the Prison Litigation Reform Act (PLRA) applies to all prisoner lawsuits, regardless of their fee status and the PLRA's physical injury requirement does not apply to prisoners' First amendment claims. The court also held that the occasional delay in delivering a prisoner's mail does not violate the First amendment.

Indiana state prisoner John Rove and Jeffrey Lant, his free world correspondent, filed suit claiming prison officials delayed delivery of their mail on several occasions. The district court dismissed the suit under 28 U.S.C. § 1915A because Rowe did not allege he had suffered any physical injury under 42 U.S.C. § 1997e(e). The appeals court affirmed the dismissal, but for different reasons.

The appeals court held that district courts can screen, and sua sponte dismiss, prisoner lawsuits under 28 U.S.C. § 1915A even if the prisoner has prepaid the filing fee.

42 U.S.C. & 1997e(e) states that prisoners cannot file suit for mental or emotional injury unless they can show physical injury. The court noted that in *Robinson v. Page*, 170 F.3d 747 (7th Cir. 1999) it had held § 1997e(e) does not require a showing of physical injury in all prisoner civil rights suits. Claims for other types of non physical injury do not implicate the statute. "Here, Rowe alleges that prison officials violated his First amendment rights by interfering with the receipt of his mail. A deprivation of First amendment rights standing alone is a cognizable injury ... Indeed, Rowe does not allege that he suffered any additional injury as a consequence of

his mail being delayed, nor must he. See: *Canell v. Lightner*, 143 F.3d 1210, 1213 (9th Cir. 1998). A prisoner is entitled to judicial relief for a violation of his First amendment rights aside from any physical, mental or emotional injury he may have sustained."

Turning to the merits, the court held that the plaintiffs had failed to state a claim because the mail delays were short term and sporadic. The court also held the lower court erred in dismissing Lant's claims for lack of standing. But, the court held, district courts can, under the PLRA, screen lawsuits filed by anyone, prisoner or not, whether the filing fee is paid or not. See: *Rowe v. Shake*, 196 F.3d 778 (7th Cir. 1999).

## Alabama Officials Guilty in Phone Scam

A former Alabama state auditor, county commissioner and another man pleaded guilty in July 1999 to federal charges stemming from a prison pay phone scam operated in Alabama and Louisiana by Global Tel\*Link, a Mobile-based company. Former state auditor Terry Ellis pleaded guilty to tax evasion. Former Mobile County Commissioner Dan Wiley and salesman Donald G. Bahouth pleaded guilty to tax evasion and money laundering.

In exchange for the pleas, the government dropped conspiracy and mail fraud charges, according to The Associated Press. In addition, the three agreed to testify against the two remaining defendants named in the indictment. They are political consultant and lobbyist Willie F. "Buddy" Hamner and businessman William T.J. "Billy" Boyett.

The federal indictment accuses the five men of defrauding the federal government, the state of Alabama, Mobile county taxpayers and families of jail detainees and prisoners over a four-year period.

Global Tel\*Link, previously known as Global Telcoin and United Telcoin, bilked customers who accepted automated collect calls from prisoners by padding minutes and adding hidden charges. Then in order to lower the size of the commissions paid by the company to state and local governments, fake phone sales figures were used in accounting reports.

Ellis, who was the Alabama State Auditor from 1990 to January 1995, owned the company, then known as National Telcoin, with Hamner in 1989. The company supplied pay phone service to Alabama

prisons. Bahouth was a Global salesman, and Wiley maintained the billing.

Ellis told the court that he attempted to conceal his interest in the company after he was elected state auditor by making it appear that Hamner was the sole owner. And later, when Hamner developed a conflict of interest while lobbying for the Public Service Commission, Boyett became their cover. Global sold the Alabama state prison contracts in 1993 to People's Telephone Co. in Miami. Ellis told the court that he and Hamner negotiated the sale and received over 80 percent of the sales price, and Boyett, the figurehead owner, received less than 20 percent.

The indictment states that the Global added extra time to the bill for each collect call originating from prisons and jails, usually one or two minutes, and also added an extra charge of about 25 cents to each call. The estimated amount bilked from prisoners' friends and families is not known.

According to the indictment, the state of Alabama was cheated out of more than \$700,000 in lost commissions because Wiley, Hamner and Ellis submitted fake accounting reports (that, ahem, somehow escaped detection by Ellis' State Auditor's office) with lower revenue totals on which to base the state's commissions. Mobile County was cheated out of more than \$250,000 in commissions using the same scheme. Again, the fraud went "undetected" by County Commissioner Wiley.

Bahouth's statement to the court describes the Louisiana pay phone scheme. He said he negotiated a contract with US Long Distance Inc. to provide pay phone service in Louisiana's prisons. Bahouth said he tacked an extra one-cent-per minute "commission" to the amount billed customers, and would then pay USLD the negotiated per-minute amount. Bahouth told the court that he and Wiley split \$138,657 collected in that scheme.

Things began to unravel, though, after the defendants sold Global Tel\*Link to Schlumberger Technologies. The new owners quickly uncovered the billing irregularities in the company's accounts. Schlumberger obtained an \$8.5 million civil judgment in 1998 against Wiley, Bahouth and others for misrepresenting Global's financial condition at the time it was sold.

Source: Associated Press

## ***Sandin* Limits Property Interests**

The court of appeals for the Tenth circuit held that *Sandin v. Connor*, 515 U.S. 472, 115 S.Ct. 2293 (1995) applies to property interests asserted by prisoners, as well as liberty interests. In 1997 a guard at the Wyoming State Penitentiary (WSP) was killed by prisoners during an escape attempt. Prison officials responded by dramatically restricting the property, including hobby crafts, that prisoners could have within the prison. Excess property had to be mailed out of the prison.

Fight Wyoming prisoners filed suit challenging the property restrictions. The plaintiffs claimed they had a state created property interest under the prison property policy in effect when they first obtained the property in question. They also claimed their court access rights were violated. The district court dismissed the suit for failing to state a claim under FRCP 12(b)(6). The appeals court affirmed.

The court held that *Sandin* affects the property interests of prisoners, as well as liberty interests. Under that analysis, prisoners have no right to due process before being deprived of liberty or property unless the deprivation imposes an "atypical and significant" hardship. State rules or policies will not create a property interest absent that component. Applying *Sandin*, the court held that the Wyoming property rules did not create a significant deprivation.

The court also found no violation of the plaintiffs' right to court access since they pointed to no "actual injury" as required by *Lewis v. Casey*, 518 U.S. 343, 116 S.Ct. 2174 (1996).

Historically the courts have not recognized any property interests by prisoners except for money and interest in prison trust accounts, religious items and written materials. To the extent prisoners have come to possess more than that has been because of organizing and struggle, rather than litigation. See: *Cosco v. Uphoff*, 195 F.3d 1221 (10th Cir. 1999).

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# Pro Se Tips and Tactics

by John Midgley

Many prisoners have difficulties obtaining good medical care. Often prisoners assume that every failure on the part of the prison system to provide adequate medical care is a constitutional violation that can be remedied in federal court, but this assumption is not correct. In this column, I discuss what kinds of medical care claims do raise constitutional issues and also other avenues you might pursue if you have a strong claim that medical care was inadequate but do not have a constitutional claim.

## 1. Constitutional Claim or Malpractice Claim?

As part of the Eighth Amendment's prohibition on "cruel and unusual punishments," prisoners may not be denied basic medical services. In the medical care context, the Eighth Amendment is violated by "deliberate indifference" to "serious medical needs." *Estelle v. Gamble*, 429 U.S. 97 (1976). However, the Eighth Amendment does not provide a remedy for medical malpractice, that is, an error in judgment by a qualified professional acting without deliberate indifference. *Id.*

The thrust of the Eighth Amendment protection is that prison officials must provide access to qualified medical providers, emergency care and follow-up of ordered care, and that prison medical staff cannot act indifferently to serious medical needs. See, e.g., *Hoptowit v. Ray*, 682 F.2d 1237, 1252-1254 (9th Cir. 1982). Usually, a prisoner's mere disagreement with the course of treatment by a medical professional falls far short of establishing an Eighth Amendment claim, and is instead at most a claim that medical staff was negligent. If medical staff was negligent but did not act with deliberate indifference, then that staff has committed medical malpractice, which violates state tort law but is not a constitutional violation. (Note, however, that the fact that a prisoner received some medical attention often, but not always, forecloses an Eighth Amendment claim. See *Hemmings v. Gorczyk*, 134 F.3d 104, 108-09 (2d Cir. 1998)).

## 2. What Is Needed To Prove A Constitutional Claim?

In order to make out a constitutional medical care claim, you must be able to prove two elements – "deliberate indifference" to a "serious medical need."

(a.) Proving Deliberate Indifference: Deliberate indifference can be shown by any of the following:

i. Denial of or delay in access to medical personnel: See, e.g., *Weyant v. Okst*, 101 F.3d 845, 856-57 (2d Cir. 1996) (delay of hours in getting medical attention for diabetic in insulin shock raised question of deliberate indifference); *H.C. by Hewett v. Jarrard*, 786 F.2d 1080, 1083, 1087 (11th Cir. 1986) (isolation of injured prisoner and deprivation of medical attention for three days). Delay is evaluated in the context of the prisoner's particular medical condition and whether swift action was needed.

ii. Denial of access to medical practitioners qualified to address the prisoner's medical problem: See, e.g., *Howell v. Evans*, 922 F.2d 712, 723 (11th Cir. 1991) (failure to provide access to a respiratory therapist could constitute deliberate indifference), vacated as settled, 931 F.2d 711 (11th Cir. 1991); *Mandel v. Doe*, 888 F.2d 783, 789-90 (11th Cir. 1989) (physician assistant failed to diagnose a broken hip, refused to order an x-ray, and prevented the prisoner from seeing a doctor).

iii. Failure to inquire into facts necessary to make a medical judgment: See, e.g., *Liscio v. Warren*, 901 F.2d 274, 276-77 (2d Cir. 1990) (physician failed to inquire into the cause of arrestee's delirium and thus failed to diagnose alcohol withdrawal); *Miltier v. Beorn*, 896 F.2d 848, 853 (4th Cir. 1990) (doctor failed to perform tests for cardiac disease in patient with symptoms that called for them).

iv. Interference with medical judgment by budgetary or other non-medical factors: See, e.g., *Anderson v. County of Kern*, 45 F.3d 1310 (9th Cir.), amended, 75 F.3d 448, cert. denied, 516 U.S. 916 (1995) (failure to provide a translator for medical encounters can constitute deliberate indifference); *Cabrales v. County*

*of Los Angeles*, 864 F.2d 1454, 1461 (9th Cir. 1988), vacated, 494 U.S. 1091 (1989), reinstated, 886 F.2d 235 (9th Cir. 1989), cert. denied, 494 U.S. 1091 (1990) (understaffing such that psychiatric staff could only spend "minutes per month" with mentally ill prisoners); *Jones v. Johnson*, 781 F.2d 769, 771 (9th Cir. 1986) (budgetary restrictions).

v. Failure to carry out medical orders: See, e.g., *Estelle v. Gamble*, 429 U.S. at 105 ("intentionally interfering with the treatment once prescribed"); *Koehl v. Dalsheim*, 85 F.3d 86, 88 (2d Cir. 1996) (denial of prescription eyeglasses); *Boretti v. Wiscomb*, 930 F.2d 1150, 1156 (6th Cir. 1991) (nurse's failure to perform prescribed dressing change); *Erickson v. Holloway*, 77 F.3d 1078, 1080 (8th Cir. 1996) (correctional staff interference with physician orders); *Murphy v. Bray*, 51 F.Supp. 2d 877 (SD Oh. 1999) (jail doctor ordered that prisoner's AIDS medications should be allowed to be brought to him from outside, but jail practice prevented outside medications from coming in).

vi. Treatment so incompetent or lazy it isn't really "medical": "Medical treatment that is so grossly incompetent, inadequate, or excessive as to shock the conscience or to be intolerable to fundamental fairness" constitutes deliberate indifference, as does "[a] doctor's decision to take an easier and less efficacious course of treatment." *Adams v. Poag*, 61 F.3d 1537, 1543-44 (11th Cir. 1995). See also *Smith v. Jenkins*, 919 F.2d 90, 93 (9th Cir. 1990) (prisoner entitled to prove that treatment "so deviated from professional standards that it amounted to deliberate indifference"); *Williams v. Vincent*, 508 F.2d 541 (2d Cir. 1974) (doctor's throwing away prisoner's severed ear and stitching the stump, rather than trying to reattach it, may constitute deliberate indifference).

## (b.) What Is A Serious Medical Need?

A "serious medical need" is "one that has been diagnosed by a physician as mandating treatment or one that is so obvious that even a lay person would easily recognize the necessity of a

doctor's attention." *Hill v. DeKalb Regional Youth Detention Center*, 40 F.3d 1176, 1187 (11th Cir. 1994). Alternatively, "[a] 'serious' medical need exists if the failure to treat the need could result in further significant injury or 'unnecessary and wanton infliction of pain.'" *Carnell v. Grimm*, 872 F. Supp. 746, 755 (D. Hawai'i 1994), appeal dismissed in part, aff'd in part, 74 F.3d 977 (9th Cir. 1996).

This is largely a common-sense inquiry. Conditions that result in significant and unnecessary pain will usually be found to constitute serious medical needs. See, e.g., *McGuckin v. Smith*, 974 F.2d 1050, 1060 (9th Cir. 1992) ("chronic and substantial pain"); *Martin v. DeBruyn*, 880 F. Supp. 610, 614 (N.D. Ind. 1995) (ulcers); *Starbeck v. Linn County Jail*, 871 F. Supp. 1129 (N.D. Iowa 1994) (herniated disk).

Similarly, conditions that result in disability or loss of function, even without pain, will constitute serious medical needs. See, e.g., *McGuckin*, 974 F.2d at 1060 (condition that "significantly affects an individual's daily activities" is serious); *Koehl v. Dalsheim*, 85 F.3d 86, 88 (2d Cir. 1996) (loss of vision).

So, not every failure by a prison medical professional to provide proper treatment is a constitutional violation. Only where there is a serious medical need and you can prove "deliberate indifference," which is hard to prove, will you be able to claim a constitutional violation. For example, it is not a constitutional violation for a doctor to simply make a mistake, such as botching surgery. In that kind of case, you have been sent to a qualified medical professional who has recognized your problem and started on a course of appropriate treatment. Thus, your constitutional right of access to medical care has been satisfied. When the operation was botched, the doctor has done no more than be negligent, which could give you the opportunity to file a state-court civil suit for malpractice, but it would not support a federal constitutional claim.

### 3. What Kind of Case Should I File?

In cases in which you might be able to argue that there was a constitutional violation, but you have a strong claim that there was at least malpractice, you should consider filing a lawsuit in state

court in which you make both claims. State courts have jurisdiction over federal claims under 42 U.S.C. §1983, and so you can put both claims into your state court lawsuit. See report of a successful state suit raising both kinds of claims, *Griffin v. Maricopa County*, in the July 2000 *PLN* at page 11.

Technically, you could bring both claims in federal court as well, but your chances of staying in federal court are not good in many cases. In federal court, if the court finds you have a strong enough constitutional claim to go to trial, the court can in its discretion allow the state court malpractice claim to stay in the case as well. However, if the federal court finds that you do not have a strong enough constitutional claim to go forward, it will dismiss the entire lawsuit without looking into the state-law malpractice claim. In state court, by contrast, even if the constitutional claim is dismissed, you will, if you have a strong enough case, be able to stay in court on the state-law-based malpractice claim no matter what happens to the constitutional claim

### 4. The Need For Expert Testimony And Legal Representation

Except in situations where the lack of adequate care is obvious, you will be very unlikely to win a case on prison medical care, whether a constitutional or a malpractice claim, without expert medical testimony. Very few courts or juries will rule on behalf of a person complaining about medical treatment without hearing from a medical expert who says that what happened would not have happened if the medical system or the medical professionals involved had acted properly.

Unfortunately, medical experts are expensive and it is extremely hard for people who are locked up to find experts and convince them that they are going to get paid. The best way to get a medical expert is to find an attorney who will pursue your case for you, and who will hire medical experts to help with the case.

If you cannot afford to pay a lawyer but have a strong case, then you may be able to find a lawyer willing to represent you on a "contingency basis" (the lawyer will pay the costs of the case up front and will get paid only if he or she is able to win money from the defendants). Law-

yers will not take a case on contingency unless they believe they will win enough money to both pay the costs and get paid decently themselves.

If you are in federal court and have a strong constitutional claim, you can request the court to appoint counsel for you. Judges in some federal districts will appoint counsel in prisoner cases that look meritorious. State judges may or may not have the ability to appoint counsel, depending on the law in the state where your case is filed.

This column provides general information about the law, not specific advice for your case. As always, you should do your own research based on the facts of your case.

This column relies heavily on materials I co-wrote with David Fathi, now of the National Prison Project. In writing those materials we drew on work done by John Boston, New York Legal Aid Society. ■ - John Midgley

## From the PLN Department of Corrections:

In the November issue of *PLN*, on pg. 16 ("Male NJ Guard's Sexual Harassment Suit Settled for \$425,000") we reported that in December 1999 "Robert Lockiey, a guard at the same prison in New Jersey... was awarded \$3.75 in damages and \$90C,000 in attorney fees." The guard's name is Lockley, and he was awarded \$3,750,000 in punitive and compensatory damages; the court awarded \$822,000 in attorney fees in that case.

On pg. 29 ("\$12,000 Awarded in NY Slip and Fall") the last word in the title should have been "Fall" and in the body of the article where it said the court awarded "112,000," that should have read, "\$12,000."

Finally, the "Reader Interest" section printed on the back page of the November issue was an old outdated version that incorrectly listed the cost of full-year sets of back issues as \$50 (they are \$5 each, or \$60 for the full year), and the price of subscriptions for attorneys, govt agencies, libraries, organizations, corporations, etc. was incorrectly printed as \$50; the price for these Institutional/Professional/High Income subscriptions is actually \$60/year. ■

## Dismissal for Texas Prisoner's Failure to State Facts of Prior Suits

A Texas state court of appeals has held that a prisoner's lawsuit may be dismissed as frivolous because the prisoner failed to list the operative facts of his previous lawsuits, identify the parties involved, and state whether the suit was dismissed as being frivolous.

Gregory Peck Samuels, a Texas state prisoner, filed suit in state court alleging that two guards improperly confiscated 11 postage stamps. In his petition, Samuels listed two prior lawsuits under his declaration of previous filings. For one of the two suits, Samuels did not list the operative facts, name the parties involved, or state whether the suit had been dismissed as frivolous.

In 1995, as a part of the nationwide legislative suppression of prisoner litigation, Texas passed its own version of the PLRA, requiring, among other things, indigent prisoners submit an affidavit detailing all previous prose litigation by describing the type of suit, the operative facts of the suit, the cause number and court in which the suit was brought, identifying the parties to the suit, and stating whether the suit was dismissed as being frivolous or malicious. Texas Civil Practice and

Remedies Code, § 14.004. Other Sections of Chapter 14 of the Texas Civil Practice and Remedies Code allow the trial court to dismiss a petition for various reasons, including the filing of a false affidavit of previous filings; however, no section specifically authorizes dismissal for the filing of an incomplete affidavit.

The defendants moved for summary judgment and alleged that the court should dismiss the suit for failure to comply with the affidavit of previous filings requirement. The trial court denied the motion for summary judgment, but dismissed the suit with prejudice on its own motion for failure to comply with the affidavit of previous filings requirement. Samuels appealed.

The Chapter 14 dismissal of a prisoner's suit is reviewed for abuse of discretion. The court of appeals held that the purpose of the affidavit of previous filings requirement was to allow the trial court to determine whether the same issues involving the same defendants had previously been addressed by another court. In failing to provide the information required by section 14.004(a)(2), Texas Civil Practice and Remedies Code, Samuels

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thwarted the purpose of the statute. Therefore, the trial court did not abuse its discretion when it dismissed the suit with prejudice. See: *Samuels v. Strain*, 11 S.W.3d 404 (Tex. App.-Houston [1st Dist.] 2000).

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## Excessive Force Claims Requires Administrative Exhaustion

The court of appeals for the Sixth circuit held that prisoners filing suit seeking only money damages for excessive use of force by prison employees must exhaust their administrative remedies before they file suit.

Dwight Freeman, an Ohio state prisoner, filed suit seeking only money damages after a prison guard attacked him when he requested gauze bandaging while recovering from nasal surgery. The district court dismissed the suit under 42 U.S.C. § 1997e(a) because Freeman had not exhausted his administrative remedies. The court of appeals affirmed.

The appeals court noted that district courts are split on the issue of whether or not administrative exhaustion is required in excessive force suits and the circuit courts are split on whether exhaustion is required in suits seeking only money damages. The court held that it will require administrative exhaustion in

all prisoner lawsuits in that circuit, regardless of the relief sought and regardless of the underlying claim.

The court held that Freeman had not exhausted his administrative remedies under § 1997e(a) by complaining to the Ohio State Patrol about the attack. Freeman also filed a grievance, but filed his lawsuit before he had received a response. The court held that prisoners must exhaust their administrative remedies before they file suit. Administrative remedies cannot be exhausted while the suit is pending.

The case was remanded to the district court with instructions to dismiss the suit without prejudice for failure to exhaust administrative remedies. PLN has consistently told its readers to exhaust all administrative remedies to avoid dismissal such as this one. See: *Freeman v. Francis*, 196 F.3d 641 (6th Cir. 1999).

## Sexual Assault, Beatings State Claim

The court of appeals for the Second circuit held that a district court erred when it, *sua sponte*, dismissed a prisoner's claim that he was beaten and sexually assaulted by guards. The court also held that the lower court erred when it dismissed the suit under the Prison Litigation Reform Act's failure to exhaust administrative remedies and physical injury provisions.

Joshua Liner, a New York state prisoner, filed suit claiming that guards at the prison in Attica slammed his head into a cabinet, beat him, called him racial slurs and then denied him medical treatment for the injuries he sustained in the beating. Liner also claimed these same guards falsely testified against him at a disciplinary hearing, sexually assaulted him and denied him meals, showers and law library access in retaliation for prior lawsuits he had filed. The district court dismissed the lawsuit under 28 U.S.C. § 1915A for failing to state a claim and because Liner did not allege sufficient physical injury and/or exhaust his administrative remedies as required under the PLRA. The court of appeals affirmed in part, reversed and remanded in part.

The appeals court joined the Fifth, Sixth, Eighth and Tenth circuits in holding

it would review 28 U.S.C. § 1915A dismissals *de novo*. The court affirmed dismissal of Liner's equal protection, retaliation, court access and verbal abuse claims for failure to state a claim.

The court noted there is a split in the circuits as to whether § 1997e(a); requires administrative exhaustion of claims involving excessive force and which seek money damages when none are available in the prison grievance system. Rather than decide the issue, the court reversed the district court's *sua sponte* dismissal for service, and an answer, from the defendants. "We decline to resolve the complex legal issues presented here without the benefit of a more complete record, including an answer from the defendants."

The court held it was also error for the district court to dismiss Liner's sexual assault claim under 42 U.S.C. § 1997e(e), which requires physical injury for lawsuits by prisoners. The court notes that the statute does not define "physical injury." "Nevertheless, accepting the allegations in the complaint, the alleged sexual assaults qualify as physical injuries as a matter of common sense." The court held Liner had adequately stated an Eighth amendment claim stemming from the assaults. See: *Liner v. Goord*, 196 F.3d 132 (2nd Cir. 1999). ■

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# En Banc Sixth Circuit Addresses Mental Health Care

by Matthew T. Clarke

Anthony Wade was a Michigan state prisoner who committed suicide by taking an overdose of anti-depressant Sinequan (Doxepine) pills. During the year Wade was in pre-sentencing incarceration at the Wayne County Jail (WCJ), he suffered from depression and was prescribed Thorazine. Prior to his transfer to the prison, Wade had attempted suicide by hoarding Thorazine tablets and taking twenty tablets at once. WCJ officials switched Wade to liquid medication to prevent hoarding. Wade was transferred to Northfield Regional Psychiatric Hospital (NRPH). While at NRPH, Wade was prescribed liquid Sinequan and his condition improved. Upon his return to WCJ, Wade was continued on Sinequan liquid.

Wade was transferred to State Prison of Southern Michigan (SPSM). SPSM received both a pre-sentencing investigation report and a discharge planning form from WCJ. Both documents stated that Wade had psychiatric problems and had attempted suicide using hoarded pills. On the SPSM admission form it was noted that Wade had suicidal thoughts and his medication, including liquid Sinequan, was listed. Wade told an admissions nurse that he heard voices.

Wade was seen by a psychologist who administered a written test, the results of which indicated Wade was suffering from depression. A few days later, a second psychologist examined Wade and wrote a report summarizing his suicide attempt and evaluating him as a moderate risk for suicide. That same day, prison psychiatrist K. N. Mehra saw Wade and prescribed him Sinequan tablets at bedtime. The medication was to be administered under direct supervision of a nurse at a "pill line."

Three days later, Wade was placed in general population and scheduled for monthly visits with prison psychiatrist Numa Cabrera. Two weeks later, Cabrera saw Wade and noted that he was depressed, but denied having suicidal thoughts. Cabrera increased Wade's Sinequan dosage. Three weeks later, Cabrera again saw Wade, observed that he was scared and prescribed another antidepressant, Asedin, to be taken in combination with the Sinequan for a

month, until Wade could be switched to Asedin only.

A week later, Wade was transferred to another cellblock and saw another psychiatrist, Luis Rodriguez. Rodriguez noted that Wade had suicidal thoughts, but denied the desire to act on them. A psychologist saw Wade one week and three weeks later. He noted that Wade continued to be depressed and have suicidal thoughts. The next day, Wade saw Cabrera and told him that he didn't have suicidal thoughts "that often," leading Cabrera to assess Wade's condition as "improved."

Two weeks later, Wade saw Rodriguez and claimed he had no suicidal thoughts. The next week, Wade again saw the psychologist he had seen the previous month and admitted he still felt as if he wanted to kill himself. Four weeks later, Wade killed himself using hoarded Sinequan tablets.

Ruth Williams, Wade's mother, sued the prison psychiatrists, under 42 U.S.C. § 1983, alleging they violated Wade's constitutional right to necessary medical care. The district court granted summary judgment with respect to plaintiff's negligent supervision claim and denied summary judgment with respect to plaintiff's deliberate indifference claim. The psychiatrists again moved for summary judgment which the district court denied. In a previous decision reported in the July 1998 issue of PLN, a split Sixth Circuit court of appeals panel affirmed the district court with respect to Cabrera and Rodriguez, but reversed with respect to Mehra. The Sixth Circuit granted rehearing en banc and held that all three defendants were entitled to qualified immunity.

The *en banc* court held that knowledge of the initial suicide attempt and suicidal thoughts could be attributed to the psychiatrists with exception of the final psychologist's report. However, because the crux of plaintiff's case was that the psychiatrists should have prescribed liquid medication instead of pill form due to Wade's well-documented medical history, plaintiff had to prove that liquid medication distribution was less risky than supervised pill line tablet distribution. Because plaintiff offered no

evidence on this issue, she cannot prevail. The judgment of the Sixth Circuit panel was reversed, the claims against the psychiatrists were dismissed.

Plaintiff attempted to advance a products-liability analogy. However, this "is not a standard product-liability case and the standard is not whether there is something easy that the doctors, with the benefit of hindsight, could have done. It is whether they knew of and disregarded an excessive risk to inmate health or safety." This high federal standard makes it difficult, if not impossible for prisoners to win medical claims suits in federal court. Generally, a prisoner with a medical claim should file it in state court under the state's medical malpractice statutes with the much easier to prove negligence standard. See: *Williams v. Mehra*, 186 F.3d 685 (6th Cir. 1999). ■

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# WA 35% Seizure Statute Ruled on by Ninth Circuit

by Paul Wright

The court of appeals for the Ninth circuit upheld the constitutionality of a Washington state statute that allows the Washington Department of Corrections (DOC) to seize 35% of all money sent to prisoners from sources outside the prison. Faced with a very limited challenge to the statute's constitutionality the court held that the statute did not violate the Eighth amendment's ban on excessive fines or the due process clause.

In 1995 the Washington legislature unanimously enacted House Bill 2010, a wide-ranging prisoner bashing bill with a variety of punitive measures designed to make prison conditions significantly worse for prisoners. Among the bill's provisions was RCW 72.09.480, which at the time stated: "When an inmate receives any funds in addition to his or her wages or gratuities, the additional funds shall be subject to the deductions in RCW 72.09.111(1)(a)...." RCW 72.09.111(1)(a) is the statute under which money is seized from those prisoners working for private businesses who are nominally paid the minimum wage. It allows for the seizure of 35% of prisoners' income with 20% going to the DOC to pay for the "cost of incarceration" [in discovery the DOC disclosed that it plans to use this portion of the money it seizes to pay for the expansion of its private prison industries. As previously reported in PLN this results in private business being subsidized by the families of prisoners.]; 10% is placed in a DOC savings account to be given to the prisoner upon release from prison and 5% is placed in a "public safety and education account for the purpose of crime victims' compensation."

To date, all the money seized, around \$4 million, has been placed in an escrow account until the litigation surrounding the statute's legality is resolved.

Four days after the bill was signed into effect, on June 19, 1995, I filed suit in U.S. district court in Tacoma, challenging its constitutionality. The court declined to rule on my motions for a Preliminary Injunction (PI), class certification and appointment of counsel. Almost a year after the law was enacted the DOC announced it would begin seizing prisoners' money under the statute. The

delay was a result of the DOC needing the accounting software to take the money. With the litigation effectively stalled in court I drafted generic complaints challenging the statute and distributed them to prisoners across the state. Within a few weeks, about 300 complaints challenging the statute had been filed in the federal court in Tacoma.

To manage the cases, the court appointed Chris Youtz of the Seattle law firm Sirianni and Youtz as class counsel. An amended complaint was filed claiming RCW 72.09.480 violated the due process, equal protection, ex post facto, double jeopardy, bill of attainder, takings and excessive fines clauses of the U.S. constitution as well as the impairment of federal rights to receive federal benefits and funds.

The state filed a motion to dismiss under Fed.R.Civ.P. 12(b)(6), arguing that none of the constitutional issues raised stated a claim upon which relief could be granted. The district court granted the motion and summarily dismissed all of the constitutional claims.

The court later granted summary judgment to the plaintiff class holding that the statute was void to the extent that it allowed for the seizure of veterans' benefits under 38 U.S.C. § 5301(a); social security benefits under 42 U.S.C. § 407(a); settlements and judgments from civil rights lawsuits brought under 42 U.S.C. § 1983; and Native American funds disbursed under 25 U.S.C. § 410, 1401-07 and 43 U.S.C. § 1606(h) and 1620. The district court held that the seizure of funds under 29 U.S.C. § 1291 of the Employment Retirement Income Security Act of 1974 (ERISA) did not violate the Act's preemption provisions. The defendants did not appeal the grant of summary judgment on the federal benefits claims. The prisoner class appealed the dismissal of only two constitutional claims. The court of appeals affirmed in part, reversed in part and remanded.

## Tax Injunction Act

At the outset, the appeals court held that it had subject matter jurisdiction to hear the case. The DOC argued that the Tax Injunction Act (TIA), 28 U.S.C. § 1341,

deprived the federal courts of subject matter jurisdiction to hear the case. The TIA prohibits federal courts from "enjoin[ing], suspend[ing] or restrain[ing] the assessment, levy or collection of any tax under state law where a plain, speedy and efficient remedy may be had in the courts of such state."

Federal law determines whether an assessment qualifies as a "tax" for TIA purposes. The factors used to make this determination are: 1) the entity that imposes the deduction; 2) the parties on whom the deduction is imposed; and 3) whether the funds collected from the deduction are spent for general public purposes or used for the regulation and benefit of the parties on whom the deduction is imposed. See: *Bidart Brothers v. California Apple Commission*, 73 F.3d 925, 931 (9th Cir. 1996).

Based on these factors, the court held that RCW 72.09.480 is not a tax for TIA purposes as the 5% and 10% deductions, for the crime victim fund and the prisoner's savings account respectively, were not paid to the state's general fund but instead benefits prisoners and crime victims. The 20% ostensibly seized for the "cost of incarceration" was likened to a "regulatory fee" by the court.

## Due Process, Excessive Fines and ERISA

The plaintiffs abandoned the majority of the constitutional claims raised in the lower court and only appealed the dismissal of their substantive due process and excessive fines clause claims. The plaintiffs also raised, for the first time on appeal, claims that the failure to pay interest on prisoner savings accounts and creating savings accounts for death row prisoners, violated the due process clause. Because these claims were not mentioned in the complaint and not raised or argued before the district court, the appeals court declined to consider the issues.

The plaintiffs did not argue that the statute was void on its face because it did not provide for a predeprivation hearing before all funds were seized. Instead, the plaintiff class argued that the district court erred in not reconsidering the due

process claim as it applied only to the seizure of federally protected funds. The court held that since the statute was void as far as seizing those funds, "the amount of process due prior to such deduction is rendered moot... We therefore affirm the dismissal of the class's due process claim based on deductions from federal benefits."

The appeals court held that the plaintiff class had standing to claim that the statute violated the excessive fines clause of the Eighth amendment. The court held that RCW 72.09.480 is punitive and therefore subject to Eighth amendment scrutiny because historically the cost of incarceration and victim restitution constitute punishment. In doing so, the court explicitly disagreed with a Washington state appeals court which held the statute was merely remedial and therefore not subject to double jeopardy or ex post facto analysis. See: *In Re Metcalf*, 92 Wn.App. 165 (Wash. Ct. App. Div. I, 1998) [PLN, Feb. 1999].

The Washington legislature has amended RCW 72.09.480 annually in attempts to moot this and other litigation against the statute. In 1997 the statute was amended to cap the amount of money that could be seized from a prisoner to no more than the total cost of the prisoner's incarceration. "In this case, the amount of the deduction appears to be directly proportional to the average cost of incarceration that the inmate will incur during his or her minimum or actual term of confinement. By definition, it seems that a fine based on a criminal's cost of incarceration will always be proportional to the crime committed."

The court rejected arguments that prisoners subject to home confinement or work release or who are court ordered to pay the cost of their confinement under RCW 9.94A.145 would be subject to duplicate or excessive assessments. "Should this occur and the deductions in fact exceed the actual cost of confinement, the inmate has an adequate post deprivation remedy for a refund through the established prison grievance procedure or by filing a tort claim with the state .... Such an adequate post deprivation remedy satisfies pro-

cedural due process when the deprivation of property is sporadic and unpredictable."

The court remanded to the district court for further proceedings to determine if any members of the class were subjected to excessive seizures between May 20, 1996 and July 27, 1997, while RCW 72.09.480 allowed for unlimited seizures. To qualify as possibly excessive a prisoner would need to have had more than \$25,000 or so seized by the state in a given year under RCW 72.09.480. As far as is known, no class member has been subjected to this type of seizure.

The court upheld the dismissal of the ERISA claim, holding that the government seizure of ERISA pensions does not violate the statute's anti alienation provisions or its preemption of state laws clause. This holding will likely enable the seizure of ERISA pensions to satisfy criminal fines, restitution and similar assessments.

### Impact of the Ruling

The negative impact of the court's ruling is difficult to overstate. Other states, such as Michigan, Missouri and Arkansas, have long had statutes allowing for the state to seize prisoners' money to pay for the cost of their captivity. However, all of these statutes required that the state first file suit and obtain a judgment before a penny can be seized. As a result, the statutes are rarely used as it is not cost effective to sue every prisoner in the state. In those states, the prisoner has ample due process, a full blown civil trial. RCW 72.09.480 by contrast, allows the state to seize 35% of every penny sent to Washington prisoners [except for the limited category of federal funds the district court found were protected from state seizure] with no due process whatsoever.

The greatest danger at this point is that other states will enact similar laws to seize prisoners' money without due process. This will proceed under the incorrect assumption that the statute is constitutional. As noted above, virtually no constitutional challenges were made to the statute on appeal. Since the appeals court found that RCW 72.09.480 was punitive and not remedial, the ex post facto and double jeopardy claims would have been viable as they increased the punishment for prisoner's convicted before the law's enactment. However, those claims were not raised on appeal.

I attempted to file a pro se supplemental brief raising a facial due process challenge to the statute on appeal as well as a takings clause claim. Both issues were raised and ruled on in the district court. They were not raised on appeal by class counsel. However, the appeals court refused to allow the filing of the brief because the class was represented by counsel. The brief was denied despite a motion for leave to file it pointing out that the claims had inexplicably been dropped by class counsel without consultation with the class or its representative. The ACLU of Washington and Pro Family Advocates of Washington attempted to file an amicus brief raising these two issues as well but the appeals court refused to accept the brief because it was not filed on time.

An amicus brief was filed on behalf of the state by right wing outfits the Washington Legal Foundation (WLF), National Organization for Victim Assistance, Citizens for Law and Order and Justice for All. The brief was written by Utah law professor Paul G. Cassell who has gained notoriety in his advocacy of legal positions that significantly increase police and prosecutorial power. He was the author of the amicus brief that led the Fourth Circuit court of appeals to overturn *Miranda v. Arizona*, a ruling later reversed by the U.S. supreme court. See: *United States v. Dickerson*, 120 S.Ct.(2000). The WLF is notorious for its longstanding crusade to gut legal programs for the poor by arguing that Interest on Lawyer Trust Account (IOLTA) funds violate the takings clause of the constitution. With no sense of shame or irony they argued in this case for the government to seize 35% of the principal of prisoners' money. In *Phillips v. Washington Legal Foundation*, 118 S.Ct. 1925 (1998) WLF successfully argued that taking the interest from lawyers' trust account may violate the takings clause. WLF has no problem with the seizure of the principal.

Litigants challenging this type of statute in federal court should note that the federal courts have subject matter jurisdiction to hear the claim. The only constitutional issues squarely addressed by the Ninth circuit in this issue was the excessive fines claim. All other constitutional claims were dismissed by the district court on a motion to dismiss and were not raised on appeal. Because the

suit was litigated as a class action, Washington prisoners will have a difficult time raising any of the dismissed issues in federal court again due to collateral estoppel. Any Washington prisoners convicted after the case was decided should not be collaterally estopped from arguing the non punitive aspects of the statute (i.e., due process and takings clause claims). See: *Hiser v. Franklin*, 94 F.3d 1287 (9th Cir. 1996). Since the punitive claims (ex post facto and double jeopardy), would apply only to those Washington prisoners who committed crimes before June 15, 1995, who are members of the class certified in this case, anyone attempting to argue these issues would first have to successfully argue that they should not be bound by the ruling in *Wright* because they were not given an opportunity to opt out of the class. By its terms, RCW 72.09.480 affects all "inmates," which is defined as not just the 15,000 people in Washington prisons but also the 56,000 people on community placement and community supervision (what parole is called now). To date, the DOC has only taken money from prisoners in captivity. See: *Wright v. Riveland*, 219 F.3d 905 (9th Cir. 2000).

#### State Spousal Suit

RCW 72.09.480 has been struck down as unconstitutional by King county superior court judge Glenna Hall as violating the uniform taxation provisions of the Washington constitution and the takings clause provisions of the Washington and U.S. constitutions. That case, *Dean v. Lehman*, is a class action suit filed on behalf of the spouses of Washington prisoners. Washington is a community property state. Since May 17, 1999, the Washington DOC has been enjoined from seizing any money sent to married prisoners under RCW 72.09.480.

Judge Hall ordered the return of all money seized from married prisoners, with 12% interest. The Washington supreme court took the case on direct review of the state's appeal in *Dean* and heard oral argument in the case in March, 2000. PLN will report new developments.

#### New Prisoner Class Action

On June 9, 2000, a separate class action suit was filed in Snohomish Co. (Everett, WA) superior court on behalf of unmarried prisoners challenging the constitutionality of RCW 72.09.480. The complaint alleges that the equal protec-

tion of unmarried prisoners are being violated since, due to the ruling, married prisoners do not have their funds seized, while unmarried prisoners do. The suit claims that RCW 72.09.480 violates due process because it provides for no pre or post deprivation hearing when money is seized. The statute also violates the tax uniformity clause of Article VII, § 1 of the Washington constitution; Article VII, § 2 of the state constitution which prevents property tax levies from exceed: one percent of the value of such property and the state constitution's due process and takings clauses. The complaint also alleges a conflict between RCW 72.09.480 and RCW 84.36 which exempts money from ad valorem taxation. RCW 6.15.020 exempts pension income from property taxation yet the DOC routinely seizes pension income under RCW 72.09.480.

The complaint seeks declaratory relief that the statute unconstitutional, an order enjoining the seizure of money from prisoners under the statute, return of the money seized to c and attorney fees and costs. This suit and *Dean* were also filed by the Seattle law firm of Sirianni and Youtz who litigated *Wright*. See: *Carothers v. Lehman*, Snohomish County Superior Court, Case No. 00-2-04749-3. ■

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# Notes from the Unrepententiary

## CA Prisoners Denied Medical Care

by Linda Evans

Once again the Prison Litigation Reform Act (PLRA) and federal courts have prevailed in their determination to suppress prisoners' human rights. Despite startling new evidence of records tampering, falsified medical test results, and medical neglect, U.S. District Court Judge Shubb has dismissed the *Shumate v. Wilson* lawsuit. *Shumate* was a class action brought by women prisoners with chronic and serious illnesses against the California Department of corrections (CDC), documenting medical abuses at the Central California Women's Facility in Chowchilla (CCWF) and the California Institution for Women in Corona (CIW).

The story of the *Shumate* case is a story of many heroic women who responded to the suffering of their sisters by taking action to fight for basic medical care in California's prisons for women. Women prisoners were dying because of medical maltreatment, misdiagnoses, denial of crucial medications, and many other forms of medical abuse. In 1994, Joann Walker, an HIV+ prisoner, began documenting the abuses of HIV+ women at CCWF. She sent their statements and testimonies to prison activists outside, who alerted the ACLU National Prison Project in Washington, D.C. Charisse Shumate, Cynthia Martin, and Marcia Bunney continued the work started by Joann (who died of AIDS related complications in July 1994) by documenting conditions and fighting for decent medical care. Through the efforts of outside activist groups like the Coalition to Support Women Prisoners in Chowchilla, the HIV/AIDS in Prison Project, the California Coalition for Women Prisoners, Legal Services for Prisoners with Children and others, demonstrations were organized outside CCWF (and later Valley State Prison for Women which opened across the street in 1995), to demand better medical care.

In 1995, the National Prison Project and Legal Service for Prison with Children took the lead in filing a federal class action lawsuit in U.S. District Court. The lawsuit did not seek monetary damages, but rather a change in policies and practice: "injunctive and declaratory relief." In January of 1998, after nearly three years

of litigation, a settlement was reached which provided for two 8-month periods of extensive monitoring by a court-appointed team of five medical experts. Fifty-five separate areas were outlined for observation and evaluation, with specific emphasis on improving prisoner access to medical staff, appropriate follow-up care after diagnoses, preventative care, continuity of the provision of medications and respecting the confidentiality of HIV+ women. In November 1998, at the end of the first eight months, the monitoring team found the two women's prisons out of compliance in 11 key areas. After the second monitoring period, the assessment team found the prisons "basically in compliance" in its final report to the court.

Every prisoner knows that such a report could only be the result of a serious cover-up of the ongoing medical abuse we all suffer and witness. In the *Shumate* case, however, indisputable evidence of the abysmal medical conditions has been uncovered just in the last two months — evidence that prompted the prisoners' attorneys to file a motion to re-open discovery in the case.

**The lab was immediately closed; its license was suspended in January 1997, then permanently revoked in May 1997.**

First, a lab scandal dating back to the beginning of *Shumate* in 1995 affected 7 of California's 33 prisons, including CCWF. On July 6, 2000, the *San Francisco Chronicle* revealed the BCL Clinical Laboratories had been faking test results for HIV, hepatitis, cancer, and other serious diseases. BCL had "won numerous low-bid contracts to run thousands of medical tests on state prisoners and faked the results in a scam inspectors call 'dry-Tabbing.'" The California Department of Health Services sent inspectors to BCL in a surprise raid on December 10, 1996. They found a lab full of idle and dysfunctional equipment, and ample hard evidence that the lab was simply making up test results for thousands of prisoners. The lab was immediately closed; its license was suspended in January 1997,

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then permanently revoked in May 1997. But the damage had been done. During the six months prior to its forced closure, BCL had billed CCWF \$161,000 for thousands of medical tests including pap smears to detect cervical cancer, HIV tests, biopsies, hepatitis tests and urinalyses. Federal regulators sent the seven state prisons which had contracts with BCL notices that the "lab results may not represent an accurate diagnosis of your patients' conditions and may require immediate follow-up in the area of pap smears and HIV testing." But systematic re-testing or patient notification was never conducted at any of the prisons — gross negligence and disregard for the effects a faked HIV or cancer test might have on a person's life. Although the CDC clearly knew about the BCL lab scandal as early as 1996, it was never revealed to the court, to the *Shumate* attorneys, nor to any of the prisons directly affected, including the

approximately 3,600 women prisoners at CCWF. This was just the beginning of the cover-up.

The second area of evidence being covered up relates directly to the *Shumate* monitoring process. On July 17 and 18, 2000, two members of the CCWF medical staff filed declarations with the state Inspector General's office exposing extensive tampering with the audit of medical care required by the settlement agreement. These whistleblowers described a team of four CDC employees from the central Sacramento office going through hundreds (if not all) of the medical files at the institution in the weeks before court-ordered monitors arrived. The two whistleblowers observed these four people working long hours with the medical records, making inappropriate additions and generally altering the files. They also described several incidents where a medical file was hidden, and monitors were informed that the charts were "unavailable." Monitors were misinformed and kept unaware of these alternations to the medical files — yet it was on the basis of these falsified files that monitors found CCWF and its infirmary "basically in compliance" with the requirements of the *Shumate* settlement.

The third area of evidence was outlined by *Shumate* attorneys as reason to re-open discovery in the case. On February 1, 2000, the California Department of Health Services reported widespread violations at the Skilled Nursing Facility (SNF), the inpatient care facility at CCWF. In a routine visit to review compliance with licensing requirements, inspectors found that the facility failed to implement care plans, carry out doctors' orders, provide appropriate diets, keep professional records, or "ensure that residents were treated with consideration, respect, and dignity..." The report documents that mental health patients were denied utensils to eat their meals, which forced them to tear off pieces of the styrofoam cover to pick up the food and place it in their mouths. The report uncovered one woman's death due to negligence: a patient was admitted to the SNF with signs of end-stage liver disease on October 4, 1999. Although a doctor ordered immediate ammonia level tests, the tests weren't done until seven hours later, and test results weren't reported until two days later. On October 7, this woman was

rushed to the outside hospital, where an ammonia level test indicated levels 100 times higher than normal. She died that night.

Yet despite all this evidence of continuing medical abuse and cover-up, in August, 2000, Judge Shubb ordered the *Shumate* case dismissed. The women plaintiffs had filed their lawsuit in 1995, well before the passage of the PLRA in 1996. Judge Shubb could have retained jurisdiction to ensure the improvements in medical care so desperately needed by California's women prisoners. Instead, he imposed the legal limitations dictated by the PLRA on the *Shumate* class action, specifically the two-year limit on court-ordered monitoring.

*Prison Legal News* reports on the horrible effects of the PLRA in nearly every issue — the *Shumate* case is one more devastating example of the limitations of the courts as a remedy for any of the abuses we suffer in prison. But there are other lessons that *Shumate* offers. The deep concern and commitment that women prisoners at CCWF and CIW showed for each other in initiating the lawsuit had a tremendous impact that cannot be erased by a court order. Medical care did improve slightly during this process — some of these changes will be permanent. The press attention drawn to prison conditions by the demonstrations and by the lawsuit itself helped to educate the public about the specific problems faced by women in prison. TV coverage has exposed other problems in the California prison system, like the sexual abuse of women prisoners by male medical staff and guards. The publicity and community mobilization probably influence the whistleblowers in their decision to step forward. The work relationship between prison activists inside and outside succeeded in winning some changes in public policy: a few prisoners have won compassionate release, and investigative hearings on conditions of confinement and medical care for women prisoners held at two women's prisons by the California legislature this October. Perhaps the most important lesson of *Shumate* is that it isn't necessary for prisoners to depend solely on the courts for relief. We must make alliances with activists and mobilize our families on the outside in order to force prison officials and bureaucrats to make the changes we've been fighting for. ■

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# News in Brief:

**AZ:** On September 12, 2000, 20 Hawaiian prisoners at a Corrections Corporation of America (CCA) prison in Florence rioted and took a guard hostage. While complaining about the way their rice was cooked, prisoners took CCA guard Dean Goodwin hostage for 15 minutes. He was later treated for head injuries and a broken hand. Two other guards suffered minor injuries. During the hour and a half uprising, prisoners smashed windows, computers, TV sets and food carts. The private, for profit prison holds 650 prisoners.

**CA:** Kern county prosecutors recently convicted California state prisoners Joseph Dunn and Donald Peifer and non prisoner Ellen Powell. Powell mailed letters saturated with methamphetamine to prisoners in 11 state prisons. The letters were then cut and sold for \$50 a strip. In 1999 Dunn was sentenced to 11 years in prison for conspiring to smuggle methamphetamine into prison; Powell was sentenced to two years in prison. On October 5, 2000, Peifer was sentenced to nine years in prison. All told prison officials confiscated three meth laced letters. References to drug use in the letters tipped them off.

**CA:** In September, 2000, Santa Clara county jail officials in San Jose hired a priest to exorcise the jail of evil spirits. Earlier in the summer, 29 Latino prisoners in a "gang dorm" purportedly summoned evil spirits with a with makeshift ouija boards. After repeated complaints of demonic possession the jail hired a catholic priest to bless the prisoners and sprinkle holy water on them and their bunks. Jail spokesman Bryan Peretti pronounced the exorcism a success.

**CA:** In September, 2000, Los Angeles law firm Quinn, Emanuel, Urquhart, Oliver and Hedges attempted to drum up new clients for its business litigation practice by mailing potential clients a promotional package that included dummy hand grenades. The purpose of the dummy grenades was to imply that business is war and the firm's lawyer-commandos are ready to fight for their clients. Instead, police bomb squads were called to dispose of some of the packages and the firm apologized for the

packages. In the process, the firm reaped ample, free national publicity.

**CA:** On September 25, 2000, child molester Eduardo Mariscal escaped from the San Quentin State Prison by using a blanket and gloves to climb over a 14 ft. razor wire fence next to a guard tower. Mariscal escaped from the medium security H unit at 2 AM. PLN sources at San Quentin state that prison tower guards were asleep when Mariscal escaped, a result of excessive overtime. At the time of the escape, Mariscal's unit was on lockdown due to a riot. On October 3, 2000, parole violator Ronnie Lee, walked away and escaped from the prison's minimum security camp while doing garden work.

**CA:** On July 29, 2000, some 120 Latino and white prisoners fought each other at the Lancaster prison. Ten prisoners were reported injured in the melee. This is part of an ongoing feud between members of the Mexican Mafia and the Nazi Low Riders.

**CO:** On September 29, 2000, Richard Abney, 31, a guard at the Rifle Correctional Center was arrested on charges of bribery, criminal extortion, official misconduct and introduction of contraband into a prison. Abney tried to extort money from prisoner Eddie Elmore, then offered to change his parole release date in exchange for \$15,000. Elmore promptly alerted prison authorities who called in police to mount a sting operation against Abney.

**CO:** In September, 2000, the Ute Mountain council announced it was unable to open its new, \$9 million, 78-bed jail in Towaoc due to a guard shortage. The jail is solely for Native American prisoners. Only three of 23 guard positions had been filled when the council dropped the requirement that all staff be of Indian descent, at which point six more applicants were hired.

**FL:** On August 31, 2000, Immigration and Naturalization Service guard Lemar Andre Smith, 33, was charged with raping Christina Madraza, a pre operative transsexual from Mexico seeking political asylum in the US. The rapes occurred on May 13 and 21, 2000, at the Krome Detention Center in Miami.

**FL:** On September 15, 2000, Zephyrhills Correctional Institution guard

Lee Russell Antonino was arrested and charged with possession with intent to sell 41.3 grams of ecstasy.

**FL:** In August, 2000, Correctional Services Corp., the nation's third largest private prison company, withdrew plans to seek a buyer, stating that its declining stock prices made it impossible to make a deal. The scandal ridden CSC runs 35 juvenile and 14 adult prisons. At the time, CSC stock was trading at \$3.91 a share. The company said it would boost its stock price by expanding its services.

**FL:** In July, 2000, Columbia Correctional Center prisoner Elton Ard was beaten to death. Prison officials claim that prisoners Andrew Busby and Charles Globe are suspects in Ard's death. On May 6, 2000, Raymond Wigley, another CCC prisoner, was killed by prisoner John Blackwelder. Blackwelder currently faces capital murder charges in that case.

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**FL:** In August, 2000, 20 prisoners in the control unit of the Florida State Prison in Starke went on a hunger strike to protest the excessive use of pepper spray by prison guards. The protest began when guards beat and pepper sprayed prisoner Eric Green, 25, who allegedly bit guard Jamie Whitaker.

**GA:** In early October, 2000, Antonio Dawson escaped from the medium security Rogers State Prison in Reidsville. While painting a prison building Dawson stole a white Honda belonging to Johnny Sikes, a Georgia DOC official who oversees the Georgia DOC's Southeast region, and escaped. Apparently Dawson took the car's keys from Sike's wife, Cindy, who is a secretary in the building being painted.

**ID:** On August 23, 2000, Benjamin Hatton, 20, assaulted two guards at the Idaho Maximum Security Institution with an unidentified weapon, leaving two guards hospitalized with cuts.

**IN:** On August 24, 2000, Indiana State Prison prisoner Harry Reuter, 61, coated himself with rubber cement and set himself on fire in the prison's hospital to protest the facility's poor medical care.

**IN:** During the summer of 2000 prisoners at the Indiana State Prison in Michigan City boycotted the commissary to protest prices 2 and 3 times that charged outside prison. The prison commissary is operated by Keefe Commissary Network Sales of Missouri. Media accounts did not indicate how effective the boycott was.

**LA:** In May, 2000, former Louisiana State Penitentiary sergeants Harrison Daniels and John Swan and Lt. Patrick Hayes were convicted in federal court and sentenced for beating prisoner Rayfield Jackson to death. Daniels was sentenced to 8 years in prison; Hays and Swan to 7 years, 3 months. Denieals inflicted the beating with "beating gloves". When Jackson finally received medical care he had a punctured lung, a ruptured kidney, a busted eardrum, broken ribs, several broken vertebrae, internal bleeding and multiple bruises. The attack occurred on December 22, 1997. Jackson died on May 16, 1998. This was the first time in 20 years that an Angola prison guard had been convicted of violating a prisoner's civil rights.

**OH:** On September 22, 2000, Tamara Welton, 30, a former laundry room supervisor at the Warren Correctional Institution in Lebanon, pleaded guilty to two counts of sexual battery for having an affair with a prisoner under her supervision. In exchange for the guilty plea, Warren county prosecutors dropped three other sexual battery charges against Welton.

**NC:** On October 3, 2000, Melvin Daniels, Donnell Clayton, Jesse Montague, Robert Cozart and Jams Davis, employees at the C.A. Dillon Training School in Butner were charged with simple assault. The staff are accused of beating juvenile prisoners at the facility in retaliation for an attack on Davis.

**NM:** On September 20, 2000, a grand jury indicted Roy Martinez, Francisco Villalobos, Samuel Silva and Gerald Archuleta in the Bernalillo County jail murder of informant Matthew Cavalier. The four accused are alleged members of the Syndicate Nuevo Mexico, the state's biggest prison gang. Cavalier was a former gang member turned snitch. When booked into the jail on a parole violation Cavalier was allegedly killed by the defendants. Cavalier was found dead on August 27, 2000, with a broken neck and strangled. Ironically, Cavalier had testified against his former associates in a prison killing case and had a contract on his life stemming from that attack.

**NM:** On July 8, 2000, 50 prisoners attacked guards and seized part of the Rio Arriba county jail in Tierra Amarilla for 12 hours. The incident began as a fight between prisoners, when guards intervened to stop the fight they were attacked. More than 100 police responded to the uprising. No injuries were reported but the jail suffered extensive damage.

**NY:** On October 10, 2000, Court TV producer Maria Zone, 35, was taken hostage by prisoner Kenneth Kimes, 25, at the Clinton Correctional Facility in Dannemora. Kimes held an ink pen to Zone's throat for four hours before guards overpowered him. Kimes, convicted of killing a New York City millionaire, was demanding that his co-defendant mother, Sante Kimes, not be extradited to California where they both face the death penalty in another murder case. The incident occurred during an interview in the prison visiting room.

Kimes had previously complained about Court TV's coverage of his case.

**VA:** On August 9, 2000, DOC prison employee George H. Jones Jr., 30, was arrested and charged with possession of cocaine with intent to distribute after police seized 10 grams of crack cocaine from him. Jones works at the DOC's academy for staff development in Avonia.

**WA:** On May 9, 2000, Snohomish county jail guard Tracey Skinner, 27, was charged with criminal misconduct, a misdemeanor, for ordering a female prisoner to undress and shower in front of him. The prisoner had taken off her pants when other staff intervened.

**WA:** On September 26, 2000, former King county (Seattle) deputy prosecutor Will Miller was sentenced to four years in prison after being convicted of selling methamphetamine to undercover police. Miller's sentence was well below the 9-10 years mandated by state sentencing guidelines. Miller had previously been arrested, but not prosecuted, when a scale, drug pipe and meth residue were found in his briefcase during a routine security search at the county courthouse. Miller resigned as a deputy prosecutor after that arrest and apparently devoted himself fulltime to selling drugs.

**WA:** In October, 2000, Robert Lee Yates, 48, pleaded guilty to murdering 13 prostitutes in Spokane county. By pleading guilty Yates avoided the death penalty in Spokane county but faces capital charges in other parts of the state. Yates began his career as a serial killer in 1975. While he was employed as a guard at the Washington State Penitentiary in Walla Walla, Yates murdered his first victims, Patrick Oliver and Susan Savage at a swimming hole near the town. Yates later joined the army as a helicopter pilot and left the area.

**Brazil:** On September 5, 2000, Sidney Santos de Jesus, the warden of the Bangu I prison in Rio de Janeiro was shot to death upon arriving home from work. De Jesus had received death threats from prisoners upset with her recent policy of increasing cell searches to stop the flow of weapons, drugs and cell phones into the prison.

**Brazil:** On September 20, 2000, groups of armed men stormed and seized three different jails in the metropolitan Sao Paulo area and freed over 200 prisoners. No injuries were reported.

## News In Brief (continued)

**England:** In September, 2000, the latest game show craze to sweep the country was "Jailbreak" where 10 contestants pose 3S "inmates" in a custom built jail staffed by a former prison warden and 30 prison guards. The contestants must "escape" in order to win a prize of \$141,000. Any "prisoner" caught trying to escape three times has to spend 24 hours in solitary confinement.

## Family Impact of Out of State Transfers Immaterial

The court of appeals for the Seventh circuit held that no due process right of minor children was violated when their imprisoned mother was transferred to a federal prison in West Virginia from a Wisconsin prison. Carin Froehlich is a Wisconsin prisoner with 3 and 5 year old children. As previously reported in PLN, due to overcrowding in the Wisconsin prison system caused by a refusal to release prisoners on parole, Wisconsin imprisons thousands of its prisoners in other states, mostly in private prisons.

In this case, Froehlich's children (but not Froehlich) filed suit claiming their mother's transfer to west Virginia deprived them of meaningful contact with their mother. They claimed violation of their Eighth, Ninth and Fourteenth amendment rights. The district court dismissed the suit for failing to state a claim and the appeals court affirmed.

The appeals court quickly dismissed the Eighth and Ninth amendment claims. The court noted that children do have a Fourteenth amendment right to associate with their parents, but family separation is part and parcel of imprisonment. The court noted that to hold otherwise would involve federal courts in "management decisions for the world's largest, though not most luxurious, hotel chain."

To date all legal challenges in federal court to the out of state transfers of prisoners have failed. See: *Froehlich v. State of Wisconsin DOC*, 196 F.3d 800 (7th Cir. 1999). ■

## Death as a Salesman

by Dan Pens

In January, 2000, Italian fashion conglomerate Benetton Group kicked off a worldwide "issue advocacy" ad campaign titled "Looking Death in the Face." The ads, featuring images of death row prisoners, sparked outrage among U.S. death penalty advocates. Which is, of course, exactly what Benetton expected. The company says that it intended the \$12 million ad campaign to foster debate on capital punishment.

But controversial Benetton ads are nothing new. Throughout the 1990s the company has become notorious for politically provocative advertising. The tactic even gained a name: "shockvertising," to denote the Italian company's use of jarring images to sell its clothing: a gaunt-faced AIDS patient on his deathbed, a stallion mounting a mare, an actor and actress dressed as a priest and a nun kissing, victims of genocide and Mafia vendettas.

Benetton creative director and photographer Oliviero Toscani selected state-sanctioned murder as the theme for his latest shockvertisement. Over a two-year period he visited prisons across the United States, accompanied by Massachusetts-based freelance journalist Ken Shulman. The pair interviewed and photographed 26 condemned men in Illinois, Kentucky, Missouri, Nebraska, and North Carolina. Together, they produced a 96-page "photo essay" that appeared as an insert in the February issue of *Talk* magazine.

"It's an intensely controversial subject, a thought-provoking campaign that's perfect for us," *Talk* magazine president and publisher Ronald Galotti told the *New York Times*. The magazine, a joint venture of Hearst Corporation and Miramax Film Corporation (a division of Walt Disney Co.) enjoyed an enormous publicity windfall from the controversy surrounding publication of the insert.

The 96-page photo-essay was also produced as a stand-alone Benetton catalog titled "We on Death Row." Although the "catalog" features not one stitch of a United Colors of Benetton clothing, the Benetton logo appears on every few pages. It was published in 13 languages and distributed in 60 countries. Benetton

also used death row images to produce posters and billboards worldwide.

How Toscani and Shulman gained access to the inner sanctum of America's death machine is a sore subject among prison officials. The request for access originated from the National Association of Criminal Defense Lawyers. NACDL board member and Gonzaga University law professor Speedy Rice coordinated the requests. In each state officials were told the journalist and photographer were compiling a "photo essay... designed to create a lasting record on the issue of the death penalty" as a project of the NACDL and that the project was being underwritten by Benetton.

Missouri Attorney General Jay Nixon says the NACDL and Benetton deceived prison officials, and on February 9, 2000 he filed a lawsuit in state court against Benetton and Professor Rice, seeking damages for fraud and trespass. Nixon says that when making the request, no mention was made of a catalog, billboards or a global ad campaign.

### MARY'S MAGIC

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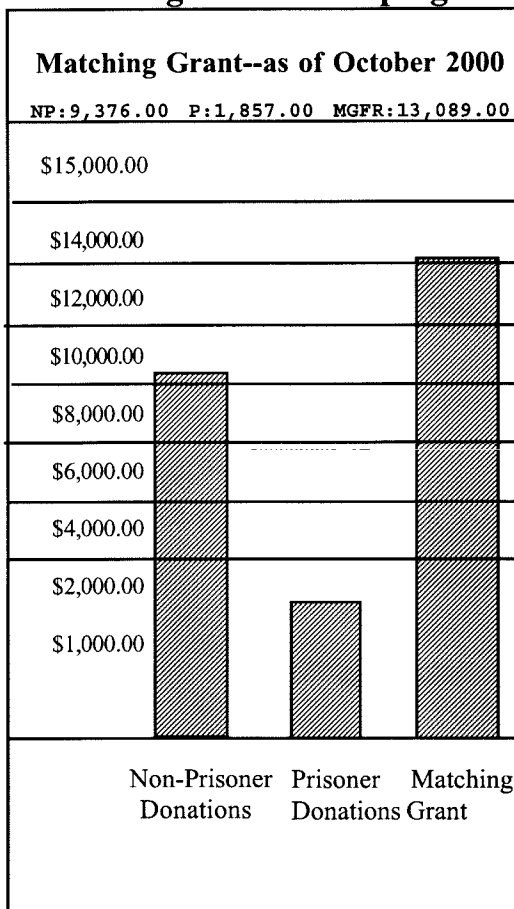
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All donations are tax deductible. New, unused stamps and embossed envelopes are fine. If you haven't donated to PLN's Matching Grant Campaign yet, please do so now. No amount is too small and every little bit helps. We will announce the amount raised in our February 2001 issue unless we meet the \$15,000 goal before then.



"It's a very secure place," Nixon said of death row, "and the fact that people lied to get in concerns us greatly. What's next? Are we going to let people film sneaker commercials there?"

Benetton spokesman Mark Major dismisses Nixon's lawsuit as a political ploy. When the February issue of *Talk* magazine hit the newsstands, the response from outraged victim's advocates was immediate and impassioned. They accused Benetton of glamorizing murderers while ignoring their grisly crimes. So furious was public reaction, in fact, that Sears, Roebuck and Co. abruptly canceled an exclusive contract to sell a line of Benetton clothes, calling the death row images "terribly insensitive."

Given the outcry, Major argued, it was inevitable that state officials try to distance themselves. Attorneys for Rice and Benetton echo the same sentiment. "I don't think they'd be suing if Benetton had printed the photos (with the caption) 'It's high time these prisoners were executed,'" said Rice's attorney, Leslie R. Weatherhead.

Weatherhead and Majors both say that state officials were given copies of other photo essays Benetton has sponsored, so they would have known the "United Colors" logo would appear on the images. As for the billboards and magazine ads, Major said, Benetton decided to expand the campaign to include them only after completing all of the death row interviews.

"At the very least, you'd have to prove that there was something false, and it was known to be false when it was stated," said Benetton lawyer Charles E. Buffin.

So far, Missouri is the only state to sue over the death row photos. But a Kentucky prison spokesperson echoed the complaint that Benetton was "not up front about their intentions" in requesting access to death row prisoners, and North Carolina Attorney General (and gubernatorial hopeful) Mike Easley announced that his office would be investigating the legality of the ads.

Nebraska's prison director, Harold Clarke, said: "The project was described as a photo essay with copies of the publi-

cation to be printed in different languages and distributed primarily in Europe and Asia, with limited distribution in the United States. Benetton was indicated as the source of funding." He added: "In retrospect I believe that the department was misled and deceived. Certainly Benetton's intentions were not clear to us..."

Perhaps prison officials were not so much "misled" as they were clueless about the impending political firestorm touched off by even "limited distribution" of the Benetton death row photos in the United States.

One thing can't be denied Benetton (and *Talk* magazine) gained more exposure through "hard news" coverage of the controversy surrounding the ads than they could possibly have gotten from the ads themselves.

And who can measure the impact the campaign — which tended to "humanize" death row prisoners — had on public policy and the shift in the U.S. towards death penalty abolition? The same week *Talk* magazine hit the newsstands, Illinois governor George Ryan issued a moratorium on state executions, saying: "Until I can be sure that everyone sentenced to death in Illinois is truly guilty — until I can be sure with moral certainty that no innocent man or woman is facing lethal injection — no one will meet that fate."

Sources: *New York Times*, *Los Angeles Times*, *National Law Journal*, Associated Press, *Omaha World-Herald*

## Information Wanted

**Seeking to hear from Kentucky prisoners with mental disorders concerning their treatment. After the recent death of a mentally ill prisoner, an international organization is investigating treatment standards. Contact:**

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**e-mail: [vanwormer@uni.edu](mailto:vanwormer@uni.edu)**

# Illinois Supermax Hunger Strike

by Dan Pens

Displaying remarkable solidarity while encaged under unimaginably oppressive conditions, more than half of the 273 prisoners at the Tamms Supermax prison in downstate Illinois began a hungerstrike by refusing their breakfast on May 1, 2000. Prison officials said 173 prisoners joined the action. Alan Mills, a lawyer who represents Tamms prisoners, pegged the number at 200.

According to the *Chicago Tribune*, the strike garnered more media attention than any previous Tamms protest. The Tribune's Christi Parsons reported two weeks into the strike that: "Media coverage— relayed to inmates via radio, television and conversations with their lawyers — has inspired more participation than the usual hunger strikes, prison officials say."

Published reports of the number of strikers mostly relied on "official" numbers: by lunchtime on May 3, 128 prisoners were still refusing to eat and as of May 4, 61 prisoners were still on the hungerstrike, said a spokesman from the State's Attorney's Office.

"This is quite a wonderful and amazing thing," said Jean MacLean Snyder, an attorney with the MacArthur Justice Center who has filed a class action lawsuit in federal court on behalf of mentally-ill Tamms prisoners. "I don't know when there's been a protest involving this many men at an Illinois prison. It's an outstanding example of a peaceful protest."

Before the strike began Tamms prisoners had prepared an articulate 3-page list of demands which they managed to distribute to the press. Their well-thought-out media strategy resulted in newspapers from St. Louis to Chicago reporting at least some of their demands, rather than relying solely on soundbites doled out by official prison spinmeisters.

First on their list of demands was: "that all prisoners suffering from psychological and or mental illness be removed from Tamms, where often times they are ridiculed, harassed and provoked by overzealous and unprofessional prison guards; and placed in a mental health setting, which will provide adequate and proper care."

According to Ms. Snyder, about 10 to 20 percent of Tamms prisoners are too mentally ill to control their actions. Another 60 percent, she estimates, face serious and long-lasting psychological damage from extreme conditions of confinement that the United Nations

Committee Against Torture calls "excessively harsh."

As part of the class action lawsuit Ms. Snyder obtained videotapes from security cameras inside Tamms. The videos offer a rare glimpse behind the steel curtain of America's supermax gulag archipelago. After viewing one of the tapes, Daniel Bergner [author of "God of the Rodeo: The Quest for Redemption in Louisiana's Angola Prison"] penned the following description for *The Reporter*:

Robert Boyd, 23 years old, serving 15 years for auto theft and related charges and four more for wielding a homemade knife in another prison, smashes the overhead fluorescent bulb with a rolled-up mat, the only furniture in his strip cell in Tamms's health care unit. He's on suicide watch. With the shards of glass he slices his upper arm, yelling unintelligibly about his father, who died a few days ago. Guards peer in through the plexiglass door. Minutes pass, guards watching, as Boyd shouts he's going to kill himself and hacks across his chest and stomach. Blood is streaming. Six minutes have now gone by since he began to cut. Outside the cell one guard asks another, "Did you call for a nurse?" "Yeah," his partner replies, "I called 'em." At last a nurse arrives. "Boyd, Boyd," she says, and disappears. Boyd slashes his neck. One of the guards shouts, "If you don't stop it I'm going to have to beat the shit out of you. I'm going to have to [pepper] spray you." Boyd soon puts his hands through the cell door to be cuffed. "I'm sweating," he announces as he's taken out. "I'm hot, I just went crazy, I'm all right now."

This scene is recorded on video... both to protect the state against liability and to prosecute the inmates for damaging state property. "Okay," a guard behind the portable camera says on another tape after another episode of self-mutilation, "we'll take the camera in to get a view of the cell with glass all over it for our future prosecution."

"At Tamms," reports Bergner, "a man carves his own body, then eats the scraps of the bloody tissue, tears out his sutures after he is treated, and rubs his feces into his freshly reopened wounds; another drives staples into his chest by hand, embedding them so deeply they can be located only by X-ray; another, while waiting in a visiting area holding cell to speak with Snyder, masturbates behind the plexiglass while simultaneously smearing the door with his own excrement..."

But the DOC contends that it is careful to screen out the mentally ill; those who do go to Tamms, the department argues, are "capable of rational and self-willed response to punishment."

"At the Tamms Correctional Center," writes Anthony Schabb, the DOC's director of mental health services, in a court affidavit, "there is currently only one inmate who may be fairly labeled seriously mentally ill, and he is not one of the [class action lawsuit's 34] named plaintiffs."

Other grievances listed by the Tamms hungerstrikers include: arbitrary, vague and unwritten policies; the indiscriminate use of chemical sprays that injure not only the prisoner(s) targeted, but every other prisoner on the pod; abolishment of the use of "meal loaf" as a punishment; interpreters for non-English speaking prisoners; abolishment of the practice of arbitrarily delaying the delivery of incoming and outgoing mail (and cessation of the practice of "removing, redacting or altering the postmarked dates on our incoming mail... this is done deliberately to conceal the fact that our letters are being withheld by prison officials beyond the date they're supposed to be delivered"); the right to take the G.E.D. for credit; the right to take more than one shower a week; abolishment of the policy that requires prisoners' visitors to submit a separate "visitor request form" fourteen days in advance of each visit (a policy "designed solely to discourage visits"); the right to make telephone calls; the right to outside recreational opportunities, "other than those that are allowed now, which is only to pace back and forth in a concrete box [for one hour, alone, several times a week] where the only equipment is a rubber handball."

When Tamms prisoners spend their solitary "recreation" hour, pacing in a tiny concrete tiger cage, neighbors of the rural prison occasionally hear their inhuman howling. Most remain unbothered by the sound, though. Tamms is one of those tiny communities left behind by the New Economy. Townspeople literally begged the state to host the \$79 million prison in order to bring in jobs. All but a handful of residents signed a "Build Us a Supermax" petition; school kids labored in English class to compose handwritten letters asking the director of corrections to build the prison in Tamms. The region's labor council served up a no-strike pledge covering all the workers who might be hired for construction.

On February 3, 1998, when the governor showed up to dedicate the 520-bed supermax prison, the high school marching band played the theme from *Green Acres* while a multitude of red, white, and blue balloons floated up

over the glimmering concrete and razor wire spires of their brand-spanking-new cathedral of incarceration.

According to U.S. Census figures, the 1990 population of Tamms, Illinois, was 748 people of whom 78 percent were white, 21 percent black (and one percent Hispanic, Native American, Asian or Pacific Islanders). Eighty-four percent of the guards working at Tamms are white; 79 percent of the prisoners are black or Hispanic, according to DOC spokesperson Nic Howell.

Among the most grievous complaints of the hunger strikers, whose numbers were reportedly down to 40 by mid-May, was a new policy instituted in November 1999 called "Renunciation of Affiliation with Security Threat Groups." This policy requires that prisoners provide information, on videotape, about their former "gang" organizations and the activities of other members. Those who refuse to become informants are told they will remain at Tamms for the remainder of their sentences—which for some means the rest of their lives.

According to Tamms prisoners, there is an unwritten part of this policy that demands continued cooperation after prisoners are transferred out of Tamms. They point out that this policy ensures that any prisoner transferring from Tamms to a mainline institution will

automatically be labeled a snitch. Hunger strikers demand an end to this policy which they said "will ultimately lead to prisoners and/or their loved ones being physically assaulted and/or murdered."

Another of their demands centers around the use of "meal loaf" by Tamms guards as a "management tool." The prison administration refers to this policy as "controlled feeding." The loaf is a mixture of whatever happens to be on the day's menu, chopped up, poured into a bread pan, and baked into an inedible block, described by one Tamms prisoner as "burnt on the outside, and an uncooked grayish goo on the inside... Dog food both smells and looks much more appetizing."

Another prisoner said in an affidavit: "Forcing human beings to eat this repulsive lump of food that they call meal loaf is torture. No one could eat this and it is inhuman to force us to go for three days without any food... You are not even allowed to starve an animal. Why can they do this to humans?"

Predictably, prison officials characterized the strikers' grievances as "trivial." Tamms Warden George Wellborn boasts that a day's worth of meal loaf contains 3,972 calories and more than the required minimums for all nutrients.

"We have a lot of inmates who are frustrated because they can't do what they used

to do," Wellborn told the Chicago Daily Law Bulletin. "This is not a country club."

Illinois governor George Ryan told the Chicago Tribune during the strike's second week that he doesn't see any need to reform the prison.

"Tamms is meant to be a tough place," Ryan said. "I'd imagine they're not happy about being there... We're not going to change conditions at the prison. The prison was built to be that way."

On June 5, the last three hunger strikers ended the well-publicized protest after going 36 days without food. They were weak and dizzy; one had lost 40 pounds. But they felt they had begun to achieve their goal of bringing pressure to bear on the prison administration by focusing media attention on their situation.

In the end, Tamms officials did make some promises about "discussing" the demands of the strikers. In their statement at the end of the protest, the prisoners declared: "We wish to reaffirm above all that all we have asked from day one is simply to be treated like human beings and not rabid animals." ■

Sources: Chicago Tribune, Chicago Daily Law Bulletin, Streetwise, The Reporter, Associated Press, Revolutionary Worker, Socialist Worker, Reader Mail

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## Attorney Fees Awarded in Challenge to Nevada Shooting Policy

A federal district court in Nevada awarded prisoners attorneys' fees and costs totaling \$374,370.17 in an action challenging prison practices concerning the use of force and mental health services. Following the decisions, the Nevada Attorney General's office negotiated the award down to \$299,500.

In 1994 prisoners of the Ely State Prison, (ESP), filed suit alleging numerous constitutional violations, including claims related to guards firing shotguns loaded with birdshot at prisoners for relatively minor infractions and the prison's failure to provide adequate mental health care for some prisoners. [PLN July 1994].

The shooting policy was instituted by then-Nevada prisoner director Ron Angelone. Angelone has since taken over the Virginia DOC, where he has instituted a similar shooting policy, which is also the subject of ongoing litigation.

Soon after the suit was filed, prison officials adopted a new shooting policy which caused the number of shootings at ESP to drop from 50 to five in the year following the filing of the complaint. Prison officials also made improvements in mental health care.

Once the changes were instituted, the parties agreed to the voluntary dismissal of the action and the court found the plaintiffs to be prevailing parties for purposes of an award of attorneys' fees and costs under 42 U.S.C. § 1988. Defendants moved for reconsideration of the prevailing party finding, arguing that plaintiffs' lawsuit was not the cause of the changes and that they would have occurred without plaintiffs' intervention.

The court rejected defendants' motion, noting that it previously ruled that plaintiffs' lawsuit was the catalyst for the prisoner's policy changes. Although the case was never in a posture that allowed the court to rule on the issues, the court found that the action achieved admirable results and there was no evidence to suggest that the changes would have occurred without the litigation. It should be noted that the catalyst theory has survived the *Prison Litigation Reform Act*, (PLRA).

The court awarded attorneys' fees totaling \$333,133.18 for seven attorneys and a staff of paralegals and law clerks. This included compensation for travel time because an attorney traveling during business hours loses the opportunity to work productively on other

matters. The court found it appropriate, however, to limit travel charges to a maximum of 6 hours per attorney or staff member per day.

The court also awarded costs and expenses totaling \$41,236.99, for costs incurred in travel (airfare, car rental, hotels and food, gasoline, etc.), telephone calls, postage and photocopying. In doing so, the court reduced plaintiffs' photocopying rate from .22 cents to .10 cents per page, even though Attorney Generals consistently bill prisoners at extortionate rates. See: *Ilick v. Miller*, 68 F.Supp.2d 1169 (D.Nev. 1999). Don Evans, and the NPP the plaintiff attorneys in Ilick, also represent PLN in censorship litigation against the Nevada Department of Corrections. ■

## False Evidence Meets Some Evidence Standard

The U.S. court of appeals for the Seventh Circuit held that even dubious evidence satisfies the "some evidence" standard of proof in prison disciplinary proceedings. The court also held that due process does not include a right to submit further evidence on appeal in this context.

In June 1995, Monte McPherson was charged by an Indiana state prison guard "with engaging in sexual acts with another" prisoner, Tommy Steele. Specifically, Westville Correctional Center guard B. Fields claimed to have "observed" McPherson and Steele "kissing and rubbing on each others [buttocks] and holding each others [genitals] while the running of chow."

At a disciplinary hearing, McPherson failed to call any witnesses, but he testified that he had forgotten his ID badge and asked Steele to escort him back to his cell for protection. Although he admitted to hugging Steele, he denied engaging "in any sexual activity." Based on Fields' allegations, McPherson was found guilty and docked 90-days good time.

After his initial administrative appeal to the warden was denied, McPherson submitted an appeal to the Indiana Department of Corrections central office, which included a written statement by Westville guard Moore. According to the statement, Moore arrived on the scene "the same time" as Fields, but he "did not see any kissing or hugging." McPherson's final appeal was denied, nonetheless.

Since Indiana does not allow for judicial review of prison disciplinary adjudications, McPherson petitioned the local federal district court for habeas corpus relief. "Erring on the side of extreme caution," the court found Moore's statement "directly undercut the re-

liability" of Fields' report, and held that McPherson's due process rights had been violated. *McPherson v. McBride*, 943 F.Supp. 971 (N.D.Ind. 1996)[PLN Sept. 1996] The warden appealed.

On appeal, McPherson, who was now represented by counsel, argued that the disciplinary conviction was not supported by "some evidence." However, the appellate court found Fields' disciplinary report "describes the alleged infraction in sufficient detail" to meet "the 'some evidence' standard" of proof required by the Due Process Clause. The court concluded that there was "no basis for granting habeas corpus relief."

The court also reject McPherson's argument that Moore's statement undermined the "reliability" of Fields' report. The court found no due process requirement for belated consideration of evidence, and faulted McPherson for waiting "until the second administrative appeal before he presented the evidence." In sum, the court concluded that the hearing accorded McPherson all the process he "was due under the Constitution."

On a final note, the court observed that it has "long held" that so long as the procedures used are constitutionally adequate, federal courts will not overturn prison disciplinary decisions "solely because the evidence indicates the claim was fraudulent." The decision of the district court was reversed. *McPherson v. McBride*, 188 F.3d 784 (7th Cir. 1999) ■

## Idaho Prisoners Can Sue for On-the-Job Injuries

The Idaho state Supreme Court held that prison officials were not entitled to summary judgment in an action brought by prisoners for injuries sustained during participation in a prison work program.

Prisoners Mark Mead and Jeff Smith were injured in separate accidents while working in the wood shop at the Idaho State Correctional Institution, as part of the prison work program which utilizes prisoner labor to produce goods and services. Mead was working under the direction of a prisoner journeyman when he had three fingers of his left hand amputated by a saw blade. Smith was working as a journeyman when he sustained a deep laceration to his left thumb and had his left index finger amputated by a saw blade.

Both prisoners filed complaints alleging that their injuries were the result of the State's negligence in failing to adequately train and supervise prisoner workers, in removing safety

equipment and in requiring the performance of inherently dangerous work. The district court granted summary judgment to prison officials in both cases, holding that under Idaho Code, Section 6-904A(2), the State was immune from any claim unless Mead and Smith could show that a State employee acted recklessly, willfully, or wantonly. The court then concluded that the prisoners failed to establish a genuine issue of material fact as to such action by a State employee.

On appeal, the Court observed that § 6-904A(2) is an immunity provision but it does not restrict the States liability to only those circumstances where a prisoner is injured by the acts or omissions of a State employee. Rather, the court held, § 6-904A(2) provides immunity to the State for unpredictable acts of third persons under the State's supervision, but does not provide absolute immunity for injuries caused by persons under the State's supervision.

The Court vacated the district court's grant of summary judgment on both the prisoners, negligent supervision and direct negligence claims, finding that there was sufficient evidence that a jury could find that the State's conduct was reckless, willful and wanton and that there was evidence of direct negligence by the State. See *Smith v. Board of Corrections*, 988 P.2d 1193 (Idaho 1999).

## D.C. Circuit Revives *Hewitt v. Helms* by Matthew T. Clarke

The D. C. Circuit court of appeals has held that, when determining whether a prisoner's segregation involves a liberty interest, the conditions of the prisoner's segregation should be compared with the conditions prison officials exercising their discretionary authority routinely impose on similarly sentenced prisoners.

Donald Hatch, a D.C. prisoner at Lorton, was charged with disciplinary offenses of fighting, lack of cooperation, and creating a disturbance. While awaiting disposition of his disciplinary charges, the prison Housing Board placed him in administrative segregation. A week later, at a disciplinary hearing, all charges against Hatch were dismissed on a technicality. The next day, without notifying Hatch or providing him an opportunity to testify, be present, or present evidence, the Housing Board met and found that Hatch was a threat to the orderly operation of the

prison, recommending that he remain segregated.

A week later, the disciplinary board reconsidered the disciplinary charges, acquitted Hatch of creating a disturbance and lack of cooperation, but found him guilty of fighting and sentenced him to 14 days of disciplinary segregation. Two months later, the Housing Board met, determined that Hatch was no longer a management problem and recommended returning him to general population. However, Hatch remained in segregation for another five months. During the entire seven months Hatch was in segregation, he was confined to his cell 23 1/2 hours a day on weekdays and all 48 hours of the weekend. He was not allowed to work or visit the library, gym, health clinic, psychological services, mailroom, clothing and bedding exchange or culinary unit. He had no access to the dentist despite four written requests complaining of a broken, decayed tooth. He had no opportunity to wash clothes or get a haircut. Whenever he left the cell block, he was transported in handcuffs and leg irons. Prison officials confiscated his legal papers and denied him access to legal telephone calls for ninety days.

Hatch filed suit under 42 U.S.C. § 1983, alleging his confinement in punitive and administrative segregation violated the Due Process Clause of the U. S. Constitution and the regulations governing Lorton. The district court granted summary judgment to the District of Columbia ("District") after determining that Hatch "did not suffer atypical and significant hardship" compared to "the typical restrictions imposed on prisoners in the general population" and therefore, under the Supreme Court's ruling in *Sandin v. Conner*, 515 U.S. 472 (1995).

The D.C. Circuit held that the district court had applied the wrong standard when determining whether a liberty interest was present. Prior to *Sandin*, the standard for determining whether a prisoner had liberty interest (and, therefore, standing to sue for its deprivation) was set by *Hewitt v. Helms*, 459 U.S. 460 (1983). Under *Hewitt*, a prisoner had a liberty interest when state law limited the discretion of the administrator using mandatory language. *Hewitt* specified that, if a prisoner had a liberty interest in remaining free of segregation, the minimum procedures required by the Due Process Clause included "some notice of the charges against him and an opportunity to present his views to the prison official charged with deciding whether to transfer him to administrative segregation." The hearing "must occur within a reasonable time following an inmate's transfer." The D.C. Circuit held that

these procedural requirements survived *Sandin*.

The D.C. Circuit held that, under *Sandin*, a liberty interest is implicated when the conditions suffered by the prisoner are an "atypical and significant hardship" when compared with "the most restrictive confinement conditions the prison officials, exercising their administrative authority to ensure institutional safety and good order, routinely impose on inmates serving similar sentences."

In this case, because Hatch spent the entire twenty-nine weeks of administrative segregation in conditions of disciplinary segregation, the district court should have first determined whether the conditions of his segregation were "atypical and significant" compared with the conditions in normal administrative segregation. If the district court found that they were, it should have determined whether Hatch likely would have been transferred to a another, more restrictive prison and face harsher conditions there. If that was likely, the court should have determined whether the conditions faced by Hatch were "atypical and significant" compared with those conditions. If the conditions were "atypical and significant," Hatch has a liberty interest in remaining free of them and is entitled to due process. If they are not, the district court must still determine whether the twenty-nine week duration of the conditions was sufficient to make them "atypical and significant" compared to the length of administrative segregation routinely imposed on similarly sentenced prisoners.

In an important and detailed analysis of the *Sandin* decision, the D. C. Circuit noted that *Sandin* was based on the difference between segregation and general population in a Hawaiian prison where general population prisoners are locked in their cells most of the day and where "inmates in administrative segregation receive only 'one extra phone call and one extra visiting privilege' (more) than inmates in disciplinary segregation. The question that district court should have asked, therefore, is this: Were the differences between the conditions of Hatch's segregation and the conditions routinely imposed on Lorton inmates serving similar sentences, including the usual conditions of administrative segregation, sufficiently greater than 'one extra phone call and one extra visiting privilege' so as to constitute an 'atypical and significant hardship'?" The case was reversed and returned to the district court for the above-outlined analysis. See: *Hatch v. D. C.*, 184 F.3d 846 (D.C. Cir. 1999).

## No Immunity for Private Prison Physician

The U.S. court of appeals for the Eleventh Circuit held that a privately employed prison physician was ineligible to claim qualified immunity. Disputed material facts surrounding his response to a prisoner's serious medical condition also precluded summary judgment on the merits.

In June 1995, Fitzgerald Hinson was a prisoner in the DeKalb County (GA) jail when he blew out an Achilles tendon playing basketball. On January 11, 1996, he had surgery to repair the injury, but seven months later he was still in a wheelchair and wearing a hospital gown. By then, atrophy had set in.

### Eleventh Circuit decided that privately employed prison physicians, such as Edmond, could not assert a qualified immunity defense.

At time, Roderick Edmond was the jail medical director. He was employed by Wexford Health Service, a for-profit entity that had contracted with the county to provide medical services to jail prisoners. Edmond was in charge of overseeing and implementing health care at the jail, and Wexford had sole responsibility in all matters of medical judgment.

After surgery, Hinson received little or no follow-up care, leading to the atrophy. Even after he was examined by Edmond on August 26, 1996, the first documented consult for therapy was not written until November 7th. Although Hinson began a program of rehabilitation at a local hospital the following day, the 74-day delay serves as the basis for his claim.

To redress his injuries, Hinson filed a § 1983 civil rights action against Edmond, and numerous county employees. Edmond responded with a motion for summary judgment that included a qualified immunity defense. The district court denied the immunity claim because the relevant law was clearly established, and summary judgment on the merits because of factual disputes. Edmond then pursued an interlocutory appeal.

While this appeal was pending, *Richardson v. McKnight*, 521 U.S. 399 (1997), was decided. In *Richardson*, the Court analyzed the history and purpose of qualified immunity, and determined that the defense was not available to privately employed prison guards, who worked for profit making corporations under contract with the state. This decision prompted the appeals court to order supplemental briefs addressing the issue.

For the same reasons *Richardson* declined to extend the doctrine of qualified immunity to privately employed prison guards, the Eleventh Circuit decided that privately employed prison physicians, such as Edmond, could not assert a qualified immunity defense. The court concluded that there was no principled distinction between the two cases, and the district court's denial of immunity was affirmed.

As for the issue summary judgment on the merits, the court determined that a jury could find Edmond's dilatory response to Hinson's condition was highly unreasonable, transcending mere negligence. Given the dispute surrounding the 10-week delay, the court affirmed the denial of summary judgment in this respect, as well. The case was remanded for further proceedings. See: *Hinson v. Edmond*, 192 F.3d 1343 (11th Cir. 1999). ■

### PA Prisoner Awarded \$300,000 in Guard Beating

On February 29, 2000, a federal jury in Pittsburgh, Pennsylvania awarded Pennsylvania prisoner Raymond Pryer \$300,000 in damages for a beating he suffered at the hands of prison guards. On September 27, 1990, Pryer complained that a guard at the State Correctional Institution-Pittsburgh had squeezed his buttocks during a pat search. As a result, prison guards Richard Siavec, Doyle Bursey, David Cook and Gerald Prorok beat Pryer on the head with batons, broke his hands, sprayed him with mace, shocked him with a stun gun, strip searched him and then beat him some more while he was naked. In 1992

Pryer filed suit claiming the beating violated his Eighth amendment rights.

In a trial for liability, with Pryer representing himself pro se, a jury found the guards liable for the unprovoked attack and held Pryer's Eighth amendment rights were violated. At the second trial, solely on the issue of damages, a jury awarded Pryer \$300,000 in damages for the injuries he suffered in the attack. The jury rejected Pennsylvania senior deputy Attorney General Thomas Halloran's argument that they award Pryer only nominal damages for the attack. Pryer was represented at the damages trial by attorney Jere Krakoff of the Pennsylvania Institutional Law Project. ■

Source: *Pittsburgh Post Gazette*

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